No. 12.

Brief of Davies, Short, Allen & McKenney for P. C.

IN THE

Supreme Court of the United States.

Filed Jan. 22, 1900.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,

Plaintiff in Error,

vs.

NELLIE PHINNEY, as Executrix of the Last Will and Testament of GUY C. PHINNEY, deceased,

Defendant in Error.

On a Writ of Error to the United States Circuit Court of Appeals for the Ninth Circuit. In Error to the Circuit Court for the District of Washington, Northern Division.

BRIEF OF THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, PLAINTIFF IN ERROR.

With Appendix of New York Premium Notice Statutes.

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JOHN B. ALLEN,
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Of Counsel.

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In the Supreme Court of the United States.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Plaintiff in Error,

vs.

NELLIE PHINNEY, as Executrix of the Last Will and Testament of Guy C. Phinney, deceased,
Defendant in Error.

No. 12.

WRIT OF ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT. IN ERROR TO THE CIRCUIT COURT FOR THE DISTRICT OF WASHINGTON, NORTHERN DIVISION.

Brief of the Mutual Life Insurance Company of New York, Plaintiff in Error with Appendix of New York Premium Notice Statutes.

I.

STATEMENT OF PROCEEDINGS IN COURT BELOW.

This action was commenced in the United States Circuit Court for the District of Washington, Northern Division,

on the 24th day of September, 1894, to recover the sum of one hundred thousand dollars ($100,000) claimed to be due on a policy of life insurance against The Mutual Life Insurance Company of New York.

The case was tried before a jury and a verdict rendered in favor of the plaintiff for the sum of ninety-seven thousand and twelve dollars and eighty-four one hundredths ($97,012 84/100).

A motion for a new trial was duly made by the defendant company. The defendant company also moved to arrest the judgment and dismiss the cause, on the ground that it did not appear by the record, proceedings and testimony that the Court had jurisdiction. Both motions were denied by the Court, and a judgment rendered on the verdict for the amount thereof.

To reverse this judgment the defendant company sued out a writ of error to the Circuit Court of Appeals for the Ninth Circuit. This writ of error was dismissed on the ground that the Circuit Court of Appeals was without jurisdiction in the case by reason of an alleged failure to file the writ of error in the Court below.

For opinion of Court by Ross, Circuit Judge, concurred in by Hawley, District Judge (see Record, p. 438).

For dissenting opinion by Gilbert, Circuit Judge (see Record, p. 446).

A petition for rehearing was filed in the Circuit Court of Appeals, Nov. 16th, 1896. For petition see Record, p. 452, which petition was thereafter denied (see Record, p. 472).

On March 21st, 1897, a petition for a writ of certiorari was filed by the defendant company in the Supreme Court of the United States with a certified copy of the record. This petition was submitted together with a brief for the plaintiff opposing the petition for certiorari (see petition of defendant company and brief in opposition on file in records of this Court).

The writ of certiorari was thereafter granted by this Court and filed (Record, p. 474), and the case now comes before this Court on such writ of certiorari.

II.

Abstract of Pleadings.

The complaint in said action, as amended, alleged the issuance of the policy to Phinney, performance by him of all its conditions, his death, the appointment of defendant in error as executrix, and the performance by her of all the conditions in the policy, and prayed judgment against the defendant in the sum of one hundred thousand dollars ($100,000). (Rec., pp. 2-9.)

Plaintiff in error answering (second amended answer), admitted the issuance of the policy, and denied, either absolutely or upon information and belief, all the other material allegations of the complaint, and alleged affirmatively.

First.—That the premiums due on the 24th day of September, 1891, and the 24th day of September, 1892, had not been paid, and that the policy by its terms had therefore been forfeited (Rec., p. 63).

Second.—That the policy had, during the lifetime of said Phinney and the plaintiff in error, been waived, abandoned and rescinded (Rec., pp. 63, 64).

Third.—A breach of warranty on the part of said Phinney in his application (Rec., p. 64).

Fourth.—An estoppel as against the said Phinney and

the plaintiff in error, by reason of the surrender by Phinney to the plaintiff in error of the policy of insurance as hereinbefore stated, and by reason of the fact, as therein alleged, that all parties to said contract had since the surrender of said policy as aforesaid treated the said contract as a lapsed and forfeited one (Rec., pp. 65, 66).

These affirmative allegations were denied by the reply of defendant in error.

III.

Chronological Statement of Facts.

1890, September 22d, Guy C. Phinney, a resident of the State of Washington, executed an application at Seattle, Washington, to the defendant company for a policy of insurance on his life for the sum of one hundred thousand dollars ($100,000), payable to his executors, administrators or assigns. This application was forwarded by Stinson, the local agent at Seattle, to Mr. Forbes the General Agent for the Pacific Coast at San Francisco, and Mr. Forbes as such general agent forwarded such application to the Home Office of the Company in the city of New York. Pursuant to such application a policy as applied for by Phinney was issued bearing date September 24th, 1890, and forwarded from the Home Office of defendant company in the city of New York to Mr. Forbes, and by the latter transmitted to Stinson at Seattle, who delivered it to said Phinney in Seattle, receiving from said Phinney at the time of delivery the first year's premium thereon, amount-

ing to thirty seven hundred and seventy dollars ($3,770).

The policy provided amongst other things as follows: "The contract * * * shall not "take effect until the first premium shall have "been paid and the policy shall have been de- "livered during my continuance in good health."

The policy further provided that Phinney should pay an annual premium of thirty-seven hundred and seventy dollars on the 24th day of September in each year thereafter for twenty full years, provided he should live so long, and further provided as follows: "This policy shall become "void by non-payment of the premium; all pay- "ments previously made shall be forfeited to the "company except as hereinafter provided."

1891, September 24th. Shortly prior to this date, which was the date when the second premium was due, a notice was sent to Phinney by both Mr. Forbes, the general agent at San Francisco, and by Mr. Stinson, the local agent at Seattle, that his premium would be due on the 24th day of September, 1891. Between the time of the receipt of this notice by Phinney and the 24th day of September, 1891, he twice met Stinson, once on the street and once in the office of the said Stinson, and requested the said Stinson to accept his notes for the payment of the said premium. This Mr. Stinson refused to do, Mr. Stinson at the time of such refusal stating that he was unable to pay the premium on that day.

October and November, 1891. From four to six weeks after the premium became due, Mr. Phinney again met Stinson and stated that he was prepared to pay the premium, but was told by Stinson that

the premium could not then be accepted unless a certificate of health was furnished. Phinney then stated that he did not think he could obtain a certificate of health, from the fact that he had been rejected by another Company a few days before. No certificate of health was ever furnished, nor did Phinney ever tender the premium.

December, 1891—January, 1892. In December, 1891, or January 1892, in a conversation between Stinson and Phinney, Stinson requested Phinney to allow him to have the policy to use for canvassing purposes and Phinney then surrendered the policy to the agent with the statement, that as the same had lapsed he had no further use for it. The agent at this time received the policy and never returned it to Phinney.

1892, September 24th. The premium falling due on this day was not paid or tendered by Phinney, nor did Phinney after the surrender of the said policy to the agent ever take any action in regard thereto, or pay or offer to pay any premium thereon.

1893, September 12th. On this day and twelve days before the maturity of the fourth premium, Phinney died, leaving his last will and testament wherein he nominated the plaintiff his executrix.

1894, July. Prior to this date no proofs of death by the said Phinney were furnished to the defendant company or demand made of it for the payment of said policy, the policy having been up to this time treated by the defendant company, Mr. Phinney and the executrix of his estate, as a forfeited and lapsed policy. Mr. Phinney held policies in two other companies at the time of his death to both of which the plaintiff presented proof of Phinney's death within one month after his demise.

IV.

STATEMENT OF THE CASE REQUIRED BY RULE 21.

The following statement presents succinctly the questions involved and the manner in which they are raised :

The first question is, whether or not the Circuit Court of Appeals erred in dismissing the writ of error below for want of jurisdiction. This question is raised by the writ of certiorari granted by this Court (see Point I).

The second question is, whether the Statute of New York relied on applies or not to any premiums which are not demanded to be paid within the State of New York, and the question is raised by the charge of the trial Court to the jury and the assignment of errors passed thereon (see Point II).

The third question is, whether or not, under the circumstances, the policy was or was not a Washington contract governed and construed by the laws of Washington alone and not by the Statutes of New York in question. This question was raised by the charge of the trial Court to the jury and the assignment of errors passed thereon (see Point III).

The fourth question is, whether if the Statute of New York applies, its equitable and true construction, aids the plaintiff in keeping the policy alive. This question is raised by the charge of the trial Court to the jury and the assignment of errors passed thereon (see Point IV).

The fifth question is, whether, if any statutory notice be required, the sending of notice was not waived by Phinney, and whether actual knowledge possessed and acted upon obviated the necessity for statutory notice. This question was raised by the charge of the trial Court to the jury and the assignment of errors passed thereon (see Point V).

The sixth question, whether or not the policy in ques-

tion was not terminated after September 24th, 1891, by waiver, estoppel, abandonment and recission. This question is raised by exceptions to the charge to the jury at the trial Court and the assignment of errors passed thereon (see Point VI).

The seventh question is, whether or not it is not essential to the maintenance of this action that Nellie Phinney should have paid or tendered the premiums before suit. This question is raised by the charge of the trial Court to the jury and the assignment of errors passed thereon (see Point VII)

V.

Specification of Errors.

The following are the errors assigned by plaintiff in error, and upon which it relies for the reversal of this cause:

I.

The said Court erred in refusing to give the jury the following instructions requested by the plaintiff in error:

"The jury are instructed that it appears from the policy of insurance sued upon by the plaintiff in this action, which bears date September 24, 1890, that it was a condition thereof that a premium of thirty-seven hundred and seventy dollars ($3,770) should be paid by Guy C. Phinney, the assured, annually, on the 24th day of September during the continuance of said contract, until premiums for twenty (20) full years should have been

paid. You are instructed that said condition was of the essence and substance of the contract, and that the payment of said premium by the assured at the time stipulated was necessary to maintain the validity of said contract. It is admitted in this action that Guy C. Phinney died on September 12, 1893. The evidence in this case established the fact that the assured, Guy C. Phinney, did not pay to the defendant at the time mentioned in said contract, the premium falling due on September 24, 1891, and by reason of said non-payment of premium by said assured the said policy became and was void and of no effect after said date, and you are directed to find a verdict for the defendant." (Assignment Errors VI, Rec., pp. 366, 367.)

II.

That the said Court erred in refusing to give to the jury the following instruction requested by plaintiff in error:

"The jury are instructed that it appears from the policy of insurance sued upon by the plaintiff in this action, which bears date September 24, 1890, that it was a condition thereof that a premium of thirty-seven hundred and seventy dollars ($3,770) should be paid by Guy C. Phinney, the assured, annually on the 24th day of September during the continuance of said contract, until premiums for twenty (20) full years should have been paid. You are instructed that said condition was of the essence and substance of the contract, and that the payment of said premium by the assured at the time stipulated was necessary to maintain the validity of said contract. It is admitted in this action that Guy C. Phinney died on September 12,

1893. The evidence in this cause establishes the fact that the assured Guy C. Phinney did not pay to the defendant, at the time mentioned in said contract, the premium falling due on September 24, 1892, and by reason of said non payment of premium by said assured the said policy became of no effect after said date, and you are directed to find a verdict for the defendant." (Assignment Errors VII. Rec., pp. 367-8.)

III.

That the said Court erred in refusing to give to the jury the following instruction requested by plaintiff in error:

"The jury are instructed that it appears from the policy of insurance sued upon by the plaintiff in this action, which bears date September 24, 1890, that it was a condition thereof that a premium of thirty-seven hundred and seventy dollars ($3,770) should be paid by Guy C. Phinney, the assured, annually on the 24th day of September during the continuance of this contract, until premiums for twenty full years should have been paid. You are instructed that said condition was of the essence and substance of the contract, and that the payment of said premium by the assured at the time stipulated was necessary to maintain the validity of said contract. It is admitted in this action that Guy C. Phinney died on September 12, 1893. The evidence in this cause establishes the fact that the assured, Guy C. Phinney, did not pay nor tender to the defendant at the time stipulated in said contract the premium falling due on September 24, 1892, and by reason of said non-payment or tender of premium by said assured said policy became and was void and of no effect after said date; and you are directed to find a verdict for the defendant." (Assignment Errors VIII. Rec., pp. 368, 369.)

IV.

That said court erred in refusing to give to the jury the following instruction requested by plaintiff in error:

"The jury are instructed that it appears from the policy of insurance sued upon by the plaintiff in this action, which bears date September 24, 1890, that it was a condition thereof that a premium of thirty-seven hundred and seventy dollars ($3,770) should be paid by Guy C. Phinney, the assured, annually on the 24th day of September during the continuance of said contract, until premiums for twenty (20) full years should have been paid. You are instructed that said condition was of the essence and substance of the contract, and that the payment of said premium by the assured at the time stipulated was necessary to maintain the validity of said contract. It is admitted in this action that Guy C. Phinney died on September 12, 1893. If you find from the evidence in this case that the assured, Guy C. Phinney, did not pay to the defendant at the time mentioned in said contract the premium falling due September 24th 1891, such non-payment by the said assured would render the said policy void and of no effect after said date; and, if you find the facts so to be, you will find a verdict for the defendant." (Assignment Errors IX. Rec., pp. 369, 370.)

V.

That the said court erred in refusing to give to the jury the following instruction requested by plaintiff in error:

"The jury are instructed that it appears from the policy of insurance sued upon by the plaintiff in this action, which bears date September 24, 1890, that it was a condition thereof that a premium of thirty-seven hundred and seventy dollars ($3,770) should be paid by Guy C. Phinney,

the assured, annually on the 24th day of September during the continuance of said contract, until premiums for twenty full years should have been paid. You are instructed that said condition was of the essence and substance of the contract, and that the payment of said premium by the assured at the time stipulated was necessary to maintain the validity of said contract. It is admitted in this action that Guy C. Phinney died on September 12, 1893. If you find from the evidence in this case that the assured, Guy C. Phinney, did not pay to the defendant at the time mentioned in the contract the premium falling due September 24, 1892, you are instructed that said non-payment by the said assured would render the said policy void and of no effect after said date; and, if you find the facts so to be, you are directed to find a verdict for the defendant." (Assignment Errors X. Rec., p. 370.)

VI.

That the court erred in refusing to give the jury the following instruction requested by the plaintiff in error:

"You are instructed that it appears from the face of said policy that it contained the following clause as one of the provisions and requirements and conditions thereof: 'Notice that each and every such payment is due at the date named in this policy, is given and accepted by the delivery and acceptance of this policy, and any further notice required by any statute is thereby expressly waived.'

"And you are instructed that said waiver by the assured, Guy C. Phinney, of the sending of any notice required by any statute, was effectual and binding upon said assured, and is effectual and binding upon the plaintiff in this

action; and that, by reason of said waiver, it was not incumbent upon the defendant, in order to declare or claim a forfeiture of said policy by reason of the non-payment of premiums according to the terms of said policy, to send to the assured the notice mentioned and required by the laws of the State of New York for the year 1876, chapter 341, as amended by the laws of the State of New York for the year 1877, chapter 321, which is relied upon by the plaintiff, even if said statute were otherwise applicable to this contract.

"And you are further instructed, that by reason of said waiver, the failure to send statutory notice did not operate to prevent the forfeiture of said policy pursuant to its terms, by reason of the non-payment of premiums falling due thereon; and if you find from the evidence that Guy C. Phinney, the assured, did not pay to the defendant the premium falling due upon said policy, according to its terms, September 24, 1891, your verdict should be for the defendant; and the same would be the result if you find that he did not pay the premium falling due thereon September 24, 1892." (Assignment Errors XI. Rec., pp. 370-2.)

VII.

That the said Court erred in refusing to give to the jury the following instruction requested by plaintiff in error:

"You are instructed that it appears from the application, policy and pleadings in this action that Guy C. Phinney, the assured, was a resident of the State of Washington, and at all times therein mentioned, and that the application for said policy was signed by said Guy C. Phinney in said State, that said policy with the application, which constituted a part thereof, completely set forth the contract between the defendant and the assured.

" You are further instructed that said application provides that said policy 'shall not take effect until the first premium shall have been paid and the policy shall have been delivered.'

" You are further instructed that it appears from said pleadings that the first premium upon said policy was paid in Seattle, Washington, and that said policy was by defendant delivered to assured at the same place.

" You are, therefore, further instructed that the policy sued upon in this action never became a complete contract, binding upon either party to it, until the delivery of the policy of the payment of the first premium in the State of Washington, and that said policy is, therefore, a Washington contract, and is governed by the laws of the said State of Washington, and not by the laws of the State of New York. And that the law of New York hereinbefore referred to and relied upon by plaintiff is not applicable to and does not govern this contract. And if you find from the evidence that Guy C. Phinney, the assured, did not pay to the defendant the premium falling due upon said policy, according to its terms, September 24, 1891, your verdict should be for the defendant; and the same would be the result if you find he did not pay the premium falling due thereon September 24, 1892." (Assignment Errors XII. Rec., p. 373.)

VIII.

That the said Court erred in refusing to give to the jury the following instruction requested by plaintiff in error:

" You are instructed that upon any theory in this case the premium under this policy maturing September 24, 1891, was unpaid at the time of Guy C. Phinney's death on September 12, 1893.

"And you are further instructed that the plaintiff executrix is not entitled to begin or maintain this action, and that her right of action against the said defendant did not accrue until she had paid or tendered to defendant the amount of this past due premium.

"You are further instructed that there is no evidence of any such payment or tender of said premium by plaintiff to defendant prior to the beginning of this action, and you are directed to find a verdict for the defendant." (Assignment Errors XIII. Rec., p. 373.)

IX.

That the said Court erred in refusing to give to the jury the following instruction requested by the plaintiff in error:

"You are instructed that upon any theory of this case the premium under this policy maturing September 24, 1892, was unpaid at the time of Guy C. Phinney's death on September 12, 1893.

"And you are further instructed that the plaintiff executrix was not entitled to begin or maintain this action, and that her right of action against the said defendant did not accrue until she had paid or tendered to defendant the amount of this past-due premium.

"You are further instructed that there is no evidence of any such payment or tender of said premium by plaintiff to defendant prior to the beginning of this action, and you are directed to find a verdict for the defendant." (Assignment Errors XIV. Rec., p. 373.)

X.

That the said Court erred in refusing to give to the

jury the following instruction requested by plaintiff in error:

"If you find from the evidence of this case that the premium under this policy, maturing September 24, 1891, was unpaid at the time of Guy C. Phinney's death, on September 12, 1893, then you are instructed that the plaintiff-executrix is not entitled to begin or maintain this action; that her right of action against the defendant did not accrue until she had paid or tendered to the defendant the amount of this past-due premium. If you find from the evidence that said premium was still unpaid, and that the amount thereof had ever been tendered to the defendant prior to the beginning of this action, your verdict should be for the defendant." (Assignment Errors XV. Rec., p. 374.)

XI.

That the said Court erred in refusing to give to the jury the following instruction requested by plaintiff in error:

"If you find from the evidence in this case that the premium under this policy, maturing September 24, 1892, was unpaid at the time of Guy C. Phinney's death, on September 12, 1893, then you are instructed that the plaintiff-executrix was not entitled to begin or maintain this action; that her right of action against the defendant did not accrue until she had paid or tendered to the defendant the amount of this past-due premium. If you find from the evidence that said premium was still unpaid, and the amount thereof has never been tendered by the plaintiff to the defendant prior to the beginning of this action, your verdict should be for the defendant." (Assignment Errors XVI. Rec., p. 375.)

XII.

That the said Court erred in refusing to give to the jury the following instruction requested by plaintiff in error:

"You are instructed that no waiver of the payment of the due premium, or of its tender, can avail the plaintiff, unless such waiver, with all the facts alleged to constitute the same, are alleged in the complaint of the plaintiff, or in her reply; and, there being no such facts pleaded, no evidence on such points can be considered by you, notwithstanding the statute of New York of 1876 and 1877, relied upon by the plaintiff; and, there being no testimony of such fact, you are instructed to find a verdict for the defendant." (Assignment Errors XVII. Record, p. 375).

XIII.

That the said Court erred in refusing to give to the jury the following instruction requested by plaintiff in error:

"The plaintiff in her complaint in this action alleges performance of the conditions of the policy sued on, on her part and on the part of Guy C. Phinney. I charge you that, under the said contract, one of the conditions to be performed by the said Guy C. Phinney was the payment of the premiums falling due on September 24, 1891, and September 24, 1892, and the plaintiff cannot recover in this action without establishing the allegations of her complaint, performance under such contract—namely, the payment of said premiums, and, if you find from the evidence in this action that the premium of 1891 or the premium of 1892 was not paid by said Guy C. Phinney, then your verdict must be for the defendant." (Assignment Errors XVIII. Rec., p. 376).

XIV.

That the said Court erred in refusing to give to the jury the following instruction requested by plaintiff in error:

"You are instructed that the said statute of New York for 1876 is local in its nature and applies only to the assured or their assigns residing in the State of New York, and that the said statute has no application to and does not govern the contract sued upon in this action; and if you further find from the evidence that the assured, Guy C. Phinney, failed to pay either the premium maturing September 24, 1891, or the premium maturing September 24, 1892, then you are directed to find a verdict for the defendant." (Assignment Errors XIX. Rec., p. 376.)

XV.

That the said Court erred in refusing to give to the jury the following instruction requested by plaintiff in error:

"Notwithstanding the requirements of the statute of New York, that notices in a particular form and at a time prescribed shall be sent by life insurance companies before they shall have power to declare a policy of life insurance forfeited; yet if the jury finds from the evidence that the defendant sent a notice to the said Guy C. Phinney, although said notice was not in the form nor at the time prescribed by the statute, and in response to said notice the said Guy C. Phinney, before the maturity of said premium, came to the representative of the company and requested further time in which to pay the said premium, and such extension of time was refused by said representative, and the said Phinney knew and recognized the fact to be that his

policy would be forfeited unless the premium was paid, and the said Phinney thereupon stated that he was unable to pay said premium, and that said premium was not paid, nor tendered by or on behalf of said Phinney at its maturity, then you are instructed that such conduct on the part of said Phinney, and of the representative of the company, would constitute a recognition by said Phinney of the notice sent to him as a valid notice, and a waiver on the part of said Phinney of the notice in the form and at the same time required by the New York statute, if the same were otherwise applicable. If you so find the facts to be, you must find a verdict for the defendant." (Assignment Errors XXI. Rec., p. 378.)

XVI.

That the said Court erred in refusing to give to the jury the following instruction requested by plaintiff in error:

"Notwithstanding the requirements of the statute of New York, that notices in a particular form, and at the time prescribed, shall be sent by life insurance companies before they shall have power to declare a policy of life insurance forfeited, yet, if the jury find from the evidence that the defendant sent a notice to the said Guy C. Phinney, although such notice was not in the form nor at the time prescribed by the statute, and in response to said notice the said Guy C. Phinney, before the maturity of said premium, came to the representative of the company, and requested further time in which to pay said premium, and such extension of time was refused by said representative, and said Phinney knew and recognized the fact to be that his policy would be forfeited unless the premium was paid, and the said Phinney thereupon stated that he was unable to pay said premium, and that said premium was

not paid or tendered to or on behalf of said Phinney at its maturity, then you are instructed that such notice so sent and acted upon would constitute a sufficient compliance with the provisions of the statute of New York in regard to the sending of notice, although the said notice was not in the form prescribed, nor at the time required by said statute ; and, if you find the facts so to be, you are directed to find a verdict for the defendant. (Assignment Errors XXII. Rec., p. 379.)

XVII.

That the said Court erred in refusing to give to the jury the following instruction requested by the plaintiff in error :

" If you find from the evidence in this case that the said Phinney did not pay the premium falling due September 24, 1891, and by his subsequent course led the defendant to believe that he considered his policy forfeited, and that he no longer relied thereon as a binding contract, and that he abandoned the same, then his executrix would be estopped from now asserting the validity of said policy in this action ; and, if you find the facts so to be, you will find a verdict for the defendant." (Assignment Errors XXIII. Rec., p. 380.)

XVIII.

That the said Court erred in refusing to give to the jury the following instruction requested by plaintiff in error :

" If you find from the evidence that said Phinney did not pay or tender the premium falling due on September 24, 1891, and that his course of conduct with the defendant

prior to his death, and the course of dealing with the defendant of the plaintiff subsequent to his death, are inconsistent with the idea that they or either of them relied upon the policy as a valid contract, and such as to lead the defendant to believe that no reliance was placed by them in said policy as a valid contract, and that the same had been abandoned, the plaintiff would be estopped from now asserting the validity of said contract; and, if you so find the facts to be, you must find a verdict for the defendant." (Assignment Errors XXIV. Rec., p. 380.)

XIX.

That the said Court erred in refusing to give to the jury the following instruction requested by plaintiff in error:

"If you find from the evidence that the said Guy C. Phinney stated to defendant's representatives in the State of Washington that he could not pay his premium falling due on the 24th day of September, 1891, it was equivalent to his saying that he could not go on with the contract, and that he had abandoned the same; and, if you find that the defendant assented thereto, then this would end the contract; and, if you so find the facts to be, you must find a verdict for the defendant." (Assignment Errors XXV. Rec., p. 381.)

XX.

That the said Court erred in refusing to give to the jury the following instruction requested by plaintiff in error:

"If you find from the evidence in this case that the said Guy C. Phinney stated to the representative of the

defendant in the State of Washington that he could not pay the premium falling due September 24, 1891, and that he did not pay nor tender the same, and that he thereafter surrendered said policy to the defendant's representatives, they mutually believing and understanding that the same was of no force or validity then or thereafter, by reason of the non-payment of the said premium, this would constitute an abandonment and recission of this contract by both parties thereto, and would put an end to the same; and, if you find the facts so to be, you must find a verdict for the defendant." (Assignment Errors XXVI. Rec., p. 381.)

XXI.

That the said Court erred in refusing to give to the jury the following instruction requested by plaintiff in error:

"The statute of New York relied upon by the plaintiff relieves against a forfeiture without the sending of a proper notice in a single instance only. It does not contemplate successive defaults, nor does it in a particular case relieve the assured of more than one default. The assured cannot go on, year after year, without the payment of premiums, and have his policy still kept alive by the statute; and, if successive defaults occur, the policy is forfeited, notwithstanding the provisions of the law of New York of 1876 and 1877, and only in a proper case the policyholder is entitled to the benefit of the act of New York of 1879, relating to the surrender value of policies forfeited.

"And, if you find from the evidence that Guy C. Phinney did not pay the premium of 1892, you must find a verdict for the defendant." (Assignment Errors XXVII. Rec., p. 382.)

XXII.

That the said Court erred in refusing to give to the jury the following instruction requested by the plaintiff in error:

"Upon all the evidence in this case you are instructed to find a verdict in favor of the defendant." (Assignment Errors, XXVIII. Rec., p. 383.)

XXIII.

That the said Court erred in giving the following instruction during the course of the charge to the jury, to-wit:

"It is contended that the policy was not continuing as a live policy and binding contract at the time of Mr. Phinney's death, on account of this provision in the policy:

"The annual premium of three thousand seven hundred and seventy dollars shall be paid in advance on the delivery of this policy; and thereafter to the company at its home office, in the City of New York, and on the 24th day of September, in every year during the continuance of this contract until premiums for twenty (20) full years shall have been duly paid to said company.

"Each premium is due and payable at the home office of the company in the City of New York, but will be accepted elsewhere when duly made in exchange for the company's receipt, signed by the president or secretary. Notice that each and every such payment is due at the date named in the policy is given and accepted by the delivery and acceptance of this policy, and any further notice, required by any statute, is thereby expressly waived. If this policy shall become void by non-payment

of premiums, all payments previously made shall be forfeited to the company, except as hereinafter provided.

"It is claimed by the defendant that, by reason of the conditions in the policy which I have read to you and the failure of Mr. Phinney in his lifetime to make the payments which matured and became payable on the 24th day of September, 1891, and on the 24th day of September, 1892, the policy lapsed, and the rights of Mr. Phinney under it were forfeited, so that it was not a continuing policy at the date of Mr. Phinney's death in 1893.

"Now, gentlemen, the law on this subject is this: These stipulations and provisions in the contract are controlled by positive statute of the State of New York. This policy was issued by a company doing business in New York, and by its terms the company became obligated to perform its contract in the State of New York. Mr. Phinney agreed to make his payments in New York, and the company was entitled to have proof of the death of Mr. Phinney made at its home office in New York. The State of New York is the place for the performance of the contract, and as to the obligations of the parties with respect to the performing the contract on both sides the laws of the State of New York must be applied.

"The law of the State of New York, therefore, dominates and controls the provisions and stipulations which I have read. The statute of New York which I have referred to makes this provision with reference to the forfeiture of life insurance policies, by insurance companies doing business in the State of New York, for non-payment of premiums:

"'Whenever any premium or interest due upon any such policy shall remain unpaid when due, a written or printed notice stating the amount of such premium or interest due on such policy, the place where said premiums or interest shall be paid, and the persons to

whom the same is payable, shall be duly addressed and mailed to the person whose life is insured, or of the asignee of the policy, if notice of the assignment has been given to the company, at his or her last-known post office address, postage paid by the company, by an agent of such company or person appointed by it to collect such premium. Such notice shall further state that unless the said premium or interest, when due, shall be paid to the company, or to a duly appointed agent or other person authorized to collect such premium, within thirty days after the mailing of such notice, the said policy and the payments thereon will become forfeited and void. In case the payment demanded by such notice shall be made within thirty days limited therefor, the same shall be taken to be a full compliance with the requirements of the policy in respect to the payment of said premium or interest, anything therein contained to the contrary notwithstanding. But no such policy shall in any case be forfeited, or declared forfeited, or lapsed, until the expiration of thirty days after the mailing of such notice; provided, however, that the notice state when the premium will fall due, and that, if not paid, the policy and all payments thereon will become forfeited and void, served in the manner hereinbefore provided at least thirty, and not more than sixty days prior to the time when the premium is payable, shall have the same effect as the service of the notice hereinbefore provided for.'

"It is also a part of the provisions of the same statute that life insurance companies doing business in New York shall not have power to forfeit any life insurance policy for non-payment of premiums, unless they give this kind of a notice and comply with this statute in regard to the mailing of the notice, either giving notice in advance of the due date of the premium at least thirty days, and not more than sixty days, and not more than sixty

days before the date or giving the notice afterwards and allowing thirty days from the date of mailing the notice for the payment of the premium. Without a compliance with this requirement, after the mailing of notice, the laws of New York deprive the insurance company of the power to forfeit the insurance policy. Compliance with this statute is an indispensable preliminary to the forfeiture for non-payment of premiums against the will and without the consent of the person insured. Strict compliance is required. If a notice does not contain the matters that the statute specifies must be in the notice, it is not a compliance, and the company would have no power to forfeit an insurance policy by reason of sending such defective notice. If a notice sent in advance or prior to the date when the premium is due is mailed twenty-nine days before that date, it is not a legal notice, it does not comply with the statute. If it should be sent sixty-one days before the date on which the premium is due, it would not be a compliance with the statute.

"The rights of the insurance company under the terms of this policy and statute of New York, would be these:

"That the company would have a right to insist upon the payment of each annual premium on the date specified in the policy. They have a right, by sending a notice, to exact payment on that date, and to forfeit the policy and all premiums paid for non-payment on that date. But in order to enjoy that right it is necessary that the statute of New York, as to mailing the notice, must be complied with. There is no proof in this case that the notice required by the statute of New York was ever sent to Mr. Phinney." (Assignment Errors XXIX. Rec., p. 383.)

XXIV.

That the said Court erred in giving the following in-

struction during the course of the charge to the jury, to wit:

"If the evidence in this case shows that Mr. Phinney did voluntarily, without being induced by false representations or deceit, rescind the contract and give up the policy rather than continue to pay the premiums provided for in the policy, that agreement would have the effect to terminate this policy, so that it would no longer be a continuing contract." (Assignment Errors XXX, Rec., p. 387.)

XXV.

That the said Court erred in giving the following instruction during the course of the charge to the jury, to wit:

"It is a question of fact, therefore, for you to determine from the evidence in the case whether there was a full, complete understanding and meeting of minds betweet Mr. Phinney and Mr. Stinson, and such an agreement and understanding entered into between them, whether the policy was surrendered and delivered up to Mr. Stinson with that understanding, and whether, relying upon that understanding, the defendant subsequently acted" (Assignment Errors XXXI, Rec., pp. 387, 388).

XXVI.

That said Court erred in giving the following instructions to the jury after they had retired to consider their verdict, and upon their return into Court for further instructions:

Q. (*By the Jury.*) If there is no evidence *pro* or *con* as to legal notice being given, is the jury to consider

this want of evidence as conclusive that no notice was given?

"A. (*By the Court.*) Yes." (Assignment errors XXXII, Rec., p. 388.)

XXVII.

That the said Court erred in giving the following instruction to the jury after they had retired to consider their verdict, and upon their return into Court for further instructions:

"Q. (*By the Jury.*) Is notice waived when the insured calls on the agent previous to the date of payment, and arranges, or tries to arrange, for the payment of the premium on the due date?

"A. (*By the Court.*) No." (Assignment Errors XXXIII, Rec., p. 388.)

XXVIII.

That said Court erred in giving th following instruction to the jury after they had retired to consider their verdict, and upon their return into Court for further instructions:

"Q. (*By the Jury.*) Can this notice be waived by the acceptance of the policy?

"A. (*By the Court.*) No." (Assignment Errors XXXVI. Rec., p. 389.)

XXIX.

That the said Court erred in giving the following instruction to the jury after they had retired to consider their verdict, and upon their return into Court for further instructions:

"Q. (*By the Jury.*) Did the company have a right to ask for a certificate of health, after the due date, from Mr. Phinney, at the time he tendered payment of his second premium, according to the New York laws? If so, had they a right to refuse payment until such certificate of health was furnished?

"A. (*By the Court.*) No." (Assignment Errors XXXV, Rec., p. 389.)

XXX.

That said Court erred in rendering and giving that certain judgment in said cause, made and entered on the 17th day of October, 1895, whereby it was ordered and adjudged by said Court that said Nellie Phinney, as executrix of the last Will and Testament of Guy C. Phinney, deceased, do have and recover of The Mutual Life Insurance Company of New York the sum of ninety-seven thousand twelve and eighty-four one-hundredths dollars ($97,012.84), with interest and costs. (Assignment Errors XXXIX, Rec., p. 391.)

POINT I.

The writ of error to the Circuit Court of Appeals was improperly dismissed on the ground that such writ was not filed in the Court below.

The Circuit Court of Appeals held that the writ of error must be *filed* in the Court below, and that to constitute such "filing" or evidence thereof in the Appellate Court,

an endorsement by the clerk on the original writ is essential, and that the writ of error in the case at bar was not *thus filed.*

THE CLAIM OF THE PLAINTIFF IN ERROR IS THAT THE WRIT IS "FILED" BY LODGING IT WITH THE CLERK UNDER THE AUTHORITY OF LAW AND THAT THE WRIT WAS SO LODGED OR FILED IN THIS CASE, AND THAT SUCH FILING AS CLAIMED BY THE DEFENDANT IN ERROR IS ONLY EVIDENCE, IS DULY EVIDENCED.

(1)

RULES AND STATUTES GOVERNING WRITS OF ERROR.

There is no statute or rule of Court which requires the writ to be "filed" ipsissimis verbis.

The rules of the Ninth Circuit pertinent to this Point are as follows:

RULE 14.

Writs of Error, Appeals, Return and Record.

1. The clerk of the court to which any writ of error may be directed shall make a return of the same by transmitting a true copy of the record, opinion or opinions of the court, bill of exceptions, assignment of errors, and all proceedings in the case, under his hand and the seal of the court.

2. In all cases brought to this court, by writ of error or appeal, to review any judgment or decree, the clerk of the court by which such judgment or decree was rendered shall annex to and transmit with the record the original writ of error and citation, or citation issued in the cause, and a certificate under seal stating the cost of the record and by whom paid.

3. No case will be heard until a complete record, containing in itself, and not by reference, all the papers, exhibits, depositions, and

other proceedings, which are necessary to the hearing in this Court shall be filed.

4. Whenever it shall be necessary or proper, in the opinion of the presiding Judge in any Circuit or District Court, that original papers of any kind should be inspected in this Court upon writ of error or appeal, such presiding Judge may make such rule or order for the safe keeping, transporting and return of such original papers as to him may seem proper, and this Court will receive and consider such original papers in connection with the transcript of the proceedings.

5. All appeals, writs of error, and citations must be made returnable not exceeding thirty days from the day of signing the citation, whether the return day fall on vacation or in term time, and be served before the return day.

6 The record in cases of Admiralty and Maritime jurisdiction shall be made up as provided in General Admiralty, Rule No. 52 of the Supreme Court.

See "Rules of the United States Circuit Court of Appeals for the Ninth Circuit."

Appendix V, 7 United States Appeals, p. 733.

The Revised Statutes of the United States as to Supersedeas.

Section 1007 provides as follows:

"In any case where a writ of error may be a supersedeas, the defendant may obtain such supersedeas by serving the writ of error, by lodging a copy thereof for the adverse party in the clerk's office where the record remains, within sixty days, Sundays exclusive, after the rendering of the judgment complained of, and giving the security required by law on the issuing of the citation. But if he desires to stay process on the judgment, he may, having served his writ of error as aforesaid, give the security required by law within sixty days after the rendition of such judgment, or afterwards with the permission of a Justice or Judge of the Appellate Court."

See also Revised Statutes of U. S., Sec. 997-1008.

One of the earliest and leading decisions is:

Brooks *vs.* Norris, 11 How., 207.

The Court says:

> " *The writ of error is not brought, in the legal meaning of the term,* " *until it is filed in the Court which rendered the judgment. It is the* " *filing of the writ that removes the* " *record* from the inferior to the " Appellate Court, and the period of limitation prescribed by the act of " Congress must be calculated accordingly. The day on which the " writ may have been issued by the clerk, or the day on which it is " tested, are not material in deciding the question."

The condition of the record in Brooks *vs.* Norris was totally different from the record herein. In the Brooks it *affimatively* appeared by an *endorsement* on the writ itself that *it was not lodged or filed* within the five years. So in 146 U. S., 54, it appeared *affimatively* that the writ was not filed in time. In the Phinney record there is absolutely nothing to indicate that the writ was not lodged. The contention of Phinney is that it does not appear by *a file mark* that it *was lodged.* But the Court can only dismiss on the ground that the record shows it was *not lodged.*

In this case, the transcript and writ of error were regularly before the Circuit Court of Appeals, and the burden was on defendant in error to show affirmatively that the writ had not been filed. This burden was not sustained.

The Court in the opinion in the case at bar cites also in support of the above rule (Record, p. 439) :

> Mussina *vs.* Cavazos, 6 Wall, 355.
> Scarborough *vs.* Paragoud, 108 U.S., 567.
> Polleys *vs.* Black River Co., 113 U. S., 81.
> Credit Co. Lin. *vs.* Arkansas Central, 128 U. S., 260.
> Warner *vs.* F. & P. R. R. Co., 54 Fed. Rep., 920.
> Stevens *vs.* Clark, 62 Fed. Rep., 321.

(2.)

STATEMENT OF FACTS RESPECTING FILING WRIT OF ERROR IN THIS CASE.

Petition made for order allowing writ of error (Rec., p. 360).

This petition was accompanied by assignment of errors (Rec., p. 363).

An order was made granting a writ of error, and fixing the amonnt of the bond (Rec., p. 362).

The bond contains the recital that the "defendant has obtained from the said Court, a writ of error."

The original writ of error was issued (Rec., p. 402).

This writ of error commands the Judges to send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, *together with this* writ" (Rec., p. 403). This *original writ* bears the following *endorsement* (Rec., p. 403): "Received a true copy of the foregoing writ of error for defendant in error.

Dated this 14th day of Dec., 1895.

A. REEVES AYRES,
Clerk of the United States Circuit Court for the Ninth Circuit, District of Washington.

By R. M. HOPKINS,
Deputy Clerk."

We show under B below that this endorsement is practically *a file mark*.

The plaintiff in error being desirious of suspending the execution of said judgment, pending appeal, caused a copy of said writ of error to be lodged with the Clerk of the said Circuit Court for the District of Washington, on the 14th day of December, 1895, upon which the following endorsement was made:

> "Received a true copy of the foregoing writ of error for defendant in error, dated this 14th day of December, 1895, A. Reeves Ayres, Clerk of the United States Circuit Court for the Ninth Circuit, District of Washington. R. M. Hopkins, Deputy Clerk." (Rec., p. 400.)

The original citation was issued and recites that the defendent is cited to appear.

"*Pursuant to a writ of error, filed in the Clerk's* "*office*" (Rec., p. 405).

This citation is signed by Judge Hanford, and is endorsed—

"Service of the within citation and receipt of a copy thereof admitted, this 14th day of Dec., 1895.

S. WARBURTON,

A. F. BURLEIGH,

Attorneys and counsel for Nellie Phinney, as Executrix of the last will and testament of Guy C. Phinney, deceased."

The Marshal also makes return of services upon Nellie Phinney, executrix (Rec. p. 406).

This original writ, and original citation with proof of service are marked "Transcript of Record" * * * Filed January 7th, 1896. F. D. Monckton, Clerk" (Rec. p. 407).

The clerk's certificate of transcript, that it certifies the "foregoing (which contains *copy* writ of error, and *copy* "citation) to be a full, true and correct copy of the re- "cord, papers and all proceedings had in the foregoing "entitled cause, *as the same remains of record and on file* "in the office of the clerk of said Circuit Court, and that "the same constitutes the return to the annexed writ of "error" (Rec., pp. 400 and 401).

It thus appears that the original citation recites that the original writ of error has been filed, and the clerk certifies that the original writ of error has been filed.

(3)

THE MOTIONS TO DISMISS AND TO AMEND.

On April 3, 1896, the defendant in error filed a motion on the record to dismiss the writ of error for want of jurisdiction because

"Said writ of error was not filed in the Court below" (Rec., p. 409).

The plaintiff in error made a counter motion for an order directing the clerk to amend his return so that the same should in all things conform to the statutes and rules, and supported this motion by affidavits of R. M. Hopkins, Deputy Clerk (Rec., pp. 412-477, James Quilter, Marshal (Rec., p. 418) R. C. Strudwick (Rec., p. 420).

The affidavit of the Deputy Clerk shows that the certificate in this case is in the form uniformly used by him for five years last past in making returns to writs of error (Rec., p. 413). The second affidavit of the Deputy Clerk states as follows:

"That immediately upon the filing of said order and bond I, at the request of said attorneys, issued the writ of error herein, a copy of which appears in the printed record at pages 398 and 399, and delivered said writ to R. C. Strudwick, one of said attorneys, who took the same from my office.

That a few minutes thereafter the said Strudwick returned to my office and delivered to and lodged and filed with me said writ of error, with the allowance thereof indorsed thereon by the before-mentioned Judge, and at the same time delivered to and lodged and filed with me a copy of said writ for the use of defendant in error.

That said original writ of error remained in my office and in my custody from said 14th day of December, 1895, until the 4th day of January, 1896, at which time I transmitted the same, with my return thereto, to this Honorable Court.

That the original citation herein, a copy of which appears on pages 395 and 396 of the printed record herein, was returned to and filed with me by a deputy marshal of the United States for the District of Washington, on the 18th day of December, 1895, and the same remained in my office and in my custody and control from said date until the same was transmitted to this Honorable Court, together with the writ of error and the return thereto, on the 4th day of January, 1896. It has not been my custom to indorse original citations and writs of error at the time they are filed with or served upon me, for the reason that I have deemed the same as writs of the Circuit Court of Appeals to be indorsed by the clerk of said Court upon his receipt of the same with my return thereto; but, as a matter of fact, the writ of error and citation herein were actually delivered to and filed and lodged with me as above stated."

The motion to dismiss came on to be heard in the said Circuit Court of Appeals at the June Term, 1896, and was heard at the same time that argument was had before said Court upon the merits, the same being taken under advisement. Two of the Judges being of opinion that said Circuit Court of Appeals was without jurisdiction to entertain the same for the reason that such writ had not been filed by the Clerk of the Circuit Court of the District of Washington, and the third being of contrary opinion, the said Court made and entered its judgment and order dismissing said writ of error.

Whereupon, the plaintiff in error presented its petition to said Court for a rehearing, which was duly taken under advisement by said Court, and afterwards, and on the 23d day of February, 1897, denied, as appears by a copy of the order of said Court.

A.

THE RECORD SHOWS AFFIRMATIVELY THAT THE WRIT OF ERROR WAS BROUGHT BY BEING PROPERLY LODGED OR FILED IN THE COURT.

See statement of facts above respecting filing writ of error in this case.

Let us see what the record in this case does show.

(1.) *Endorsements on the original writ.*

The original writ sent up to the Circuit Court of Appeals bears endorsement of the Clerk (who is the proper party to place the file mark according to the defendant in error) that on the 14th day of December, 1895, he received a true copy of such *writ* (Record, 402 to 404). That is, the Clerk states on the *original* writ that he had received a true copy of it. How could *this endorsement* have been placed by the Clerk upon the original writ unless it was in his possession. And if the original writ was in *his possession as Clerk*, it was lodged with him.

Again what is this endorsement but a file mark? It is *properly dated, and signed by the Clerk.*

In early times the great seal could not be put upon the suit, unless the writ was first signed and *allowed*. This is the origin of the *allowance*.

Crawle *vs.* Crawle, 1 Vernon, 169.

The writ is to operate on the Court having the record, and not upon the parties (Atherton *vs.* Fowler, 91 U. S., 146). How could, and how did this writ operate on the Court and clerk unless it had been lodged as the record shows it was with such Clerk. The effect of a writ of error is simply to bring the record into the upper Court. It removes the record. The recork was removed and this

could not have been done unless the writ was in the possession of the Clerk.

There is another view to be taken of this endorsement, and that is, that it shows conclusively not only that the writ was allowed by the Judge, but *issued by the clerk*, which is the same as lodging or filing. Thus in U. S. *v.* Baxter, 51 F. R., 624, the Court says that where the writ was allowed by the Judge, but was not actually issued by the Clerk it must be dismissed.

The Court will observe that the whole procedure, the petition (Record, 360), order granting writ, bond on writ of error, citation, original writ of error, took place on the 14th day of December, 1895.

(2.) *The record returned by the Clerk and the return itself are consistent only with a lodging or filing of the writ, and inconsistent with its not having been lodged or filed, and there is nothing in the record or return from which the Court can infer in any way that the writ was not lodged or filed.*

There can be no dispute but that the writ was allowed December 14th, 1895 (Rec., 362), and that it was issued (Rec., 402). Its existence is certain, th refore. The only question is, what became of it physically, of the paper itself? We have discussed above the endorsements upon it otherwise it was lodged with the clerk.

(*a.*) *The Bond.*

The writ of error having been allowed and obtained, it was desired to have it operate as a supersedeas, and to issue the citation. The bond was accordingly approved by the Judge (Rec., 394). The writ of error was signed by the clerk, and must therefore have been in his possession then, and there is nothing to show he ever parted with it, until the return was made.

The statute (Sec. 1007) declares that in a case where a

writ of error may be a supersedeas (that is, the writ of error issued and lodged), the defendant may obtain such supersedeas by serving the writ of error (that is, the writ of error issued and lodged) in the following manner: "By lodging a copy thereof (*i. e.*, of the writ issued and lodged) for the adverse party in the clerk's office, *where the record remains.*

(*b.*) *The Citation.*

The citation was *signed by the Judge* the same 14th of December. It recites "pursuant to a writ of error, *filed* " *in the Clerk's office* of the Circuit Court of the United " States, for the District of Washington."

Unless the recital was true the Judge had no power to sign the citation. It appears affirmatively by the statement of the Court itself, therefore, that the writ was filed.

In the case of Brooks *vs.* Norris, no such recital appeared.

The citation goes to the parties and brings them before the Appellate Court (Atherton *vs.* Fowler, 91 U. S., 146).

(*c.*) *The Return.*

The Revised Statutes, in Section 977, provide that there shall be annexed to and returned *with any writ of error* for the removal of a cause, a transcript of the record.

The writ of error commands that the record be sent "together with this writ," and the Clerk's certificate states that a copy of the record is sent "as the same remains of " record and on file in the office of the Clerk of said Cir- " cuit Court, and that the same constitutes the return *to* " *the annexed writ of error*," which *original* writ the Clerk attaches and sends up. *And yet the defendant in error claims that the record does not show that the writ of error was lodged with the Clerk.*

Certainly unless the record before this Court casts some

doubt upon the writ not being filed, the defendant in error cannot claim that it was not.

The proceedings above taken could not have existed unless the writ had been lodged with the Clerk. They are absolutely inconsistent with any other theory.

This is clearly shown by the case of *Ex-Parte* Ralston, 119 U. S., 613, where the Court says:

> "Certainly it has been the prevailing custom from the beginning for the Clerk of this court, or the Clerk of the Circuit Court for the proper district, to issue the writ, and for such a writ to be lodged with the clerk of the state court before he could be called on to make the necessary transcript for use in this court. Consequently, the simple lodging of the allowance with him cannot be considered as a demand for the writ; and, besides, this proceeding is not to require him to issue the writ, but *to furnish a transcript* to be annexed to and returned with the writ (Rev. Stat. Sect. 997), *which it is not his duty to give until there is a writ to which it can be annexed and with which it can be returned*. The application for the mandamus ls consequently denied."

The narrow idea of "filing" and the exclusive evidence of a "file mark" has no warrant in the history of the writ. The substance of the procedure is simply a writ properly allowed, and in the possession of the clerk of the inferior court, and annexed by him to the transcript. All that appears here.

Tidd's Practice (London, 1837) shows this: "The writ "of error being made out, is sealed in Chancery, either "on a general seal day, or, which is somewhat more "expensive, at a private seal; and after being obtained "from the cursitor, should be taken to the clerk of the "errors of the court in which the judgment was given, "who will *allow* the same, on being paid his fees, and "make out a certificate or note of the allowance; a "copy of which shall be served on the attorney for the "defendant in error" (p. 601). "The next step to be "taken by the plaintiff in error, except on a writ of error "*coram nobis* or *vobis*, is to *certify* or *transcribe* the

" record ; in order to which a transcript is made and sent, " *with the writ of error* and return, into the court " above."

(d.) The Motion to Amend.

The affidavit on this motion showed conclusively that the fact of lodging existed as indicated above in the record.

This state of facts brings the case under the rule laid down by this Court in *Ex-parte Parker*, 120 United States, p. 737. That case was dismissed from the Supreme Court of Washington Territory for the reason that evidence was not certified by the Clerk of the Trial Court. This Court looked beyond the certificate into the papers or documents contained in the record, which disclosed that all the evidence was before the Territorial Supreme Court, and said :

> " It appears from these documents very clearly that nothing was omitted in the transcript by direction of attorneys except the subpœnas ; that all the testimony introduced by the parties on the trial before the Referee was returned into the Supreme Court, duly certified as such ; and that that constituted all the evidence introduced by the parties on the trial in the Court below, in accordance with section 451 of the Territorial Code ; because it appears by the decree sought to be appealed from that the cause was finally heard upon the report of the Referee, the exceptions thereto of the defendant Parker being overruled, and the report of said Referee being in all things confirmed, except as modified and altered by the findings and conclusions of the Court itself. It thus appears with certainty that the transcript contained all the evidence introduced by the parties on the trial in the Court below."

So in Hamilton *vs.* Stafford, 78 Ill. App., 54, where the Court says : " We think the Court committed no error in " permitting said papers to be filed as of the date where " the transcript was filed. The testimony of the Justice " shows he filed them with the transcript, *and their fail-* " *ure to receive the file mark, then seems to have been due* " *to some mistake* in the clerk's office for which appellee " is not responsible."

B.

THE WRIT OF ERROR WAS PROPERLY LODGED OR FILED, EVEN IF NOT ENDORSED "FILED" IPSISSIMIS VERBIS.

We contend that filing is lodging with one having authority to receive. Endorsement of a file mark *ipsissimis verbis* is not necessary, but if it exists is only evidence of such lodging.

The question is whether the depositing or lodging with the Clerk of a Circuit Court of the United States at his office, at a usual hour, of a writ of error duly issued out of the Circuit Court of Appeals, and the payment to him of his fees and expenses for furnishing a transcript of the record, and a return of said writ by such clerk into the Circuit Court of Appeals with the record, transcript and papers in the case, as in detail hereinbefore more fully set forth, reciting that said writ of error has been filed, constitute such a filing of the writ of error in the Circuit Court as to confer jurisdiction upon the Circuit Court of Appeals, or whether, in order to confer jurisdiction, it is indispensably necessary that the Clerk of the Circuit Court write or endorse his filing mark on such writ of error. We have shown in A that the writ was lodged. It remains in this point to show the file mark unnecessary.

The plaintiff in error did all the law required of it by lodging the writ of error with the Clerk of the Circuit Court, requesting its filing, making payment of all fees and charges as estimated by the Clerk, requesting the Clerk to obey the mandate of the writ, and receiving the consent of that officer to do so.

DOES A WRITTEN ENDORSEMENT OF FILING BY THE CLERK UPON THE WRIT CONSTITUTE THE FILING CONTEMPLATED BY LAW, OR THE SOLE EVIDENCE OF THE LODGING OF THE WRIT, AND IS SUCH WRITING OR FILE MARK INDIS-

PENSABLE TO THE JURISDICTIONOF THE APPELLATE COURT?

Was it intended that the Federal Appellate Courts should be without jurisdiction and appealing parties remediless, if a Clerk of a Circuit Court, though having correctly performed every duty required of him by the mandate of a writ of error lodged with him, through ignorance, mistake or inadvertence failed to place a file mark upon it?

On the contrary, it is submitted that the lodging of the writ of error with the Clerk for the purpose of the return constitutes the filing contemplated by law. When the writ of error is placed in the custody of the Clerk of the Circuit Court at his office during usual office hours, and he is requested to make return and accepts his fees from the appealing party for that purpose, such writ is filed in the Clerk's office. An endorsement of filing affords the usual and convenient proof of what has been done, but it does not constitute the filing, nor does it afford the only proof thereof.

> "Careful practice would require that the Clerk receiving the papers should endorse upon them the date of the filing; but such endorsement is not the filing, it is simply evidence of such filing. A paper is filed when it is delivered to the proper officer and by him received to be kept on file."
>
> *Powers* vs. *State*, *87 Indiana*, *144-148*.

> "We think that a certificate of the Clerk, entered upon the brief at the time it is filed, is the best evidence of such filing, but that it is not necessary to the act of filing. 'A paper is said to be filed when it is delivered to the proper officer and by him received to be kept on file.' 13 Vin. Abr., 211; 1 Bouv. Law Dict., 568. The written memorandum of the Clerk is but the evidence of the delivery to him of the paper intended to be filed. In its absence, other testimony may properly be admitted to show that such paper was filed."
>
> *Peterson* vs. *Taylor*, 15 Georgia Rep., 483 (60 Am. Dec., 706).

"All the party can do in order to have his deed filed, is to take it to the officer, and deliver it to the Recorder. When he has done this, he cannot be charged with any default or negligence. The deed is then, in contemplation of law, filed for record."

Cook vs. *Hall*, 1 Gilman (Ill.), 575, 579.
1 Bradwell (Ill.), 145.

In the Matter of Norton, 34 N. Y. Appellate Div. Reports, 79, the statute required a certificate of election to "be filed" with the clerk. The Court said:

"A compliance with the letter of the statute is had when the paper is placed in the possession of the clerk, wherever he may be. * * * In the present case, in order to secure to the petitioner his full legal right, and to give to the voters the opportunity to vote for the candidates of their choice, we think that however technical may be the meaning which attaches to the word 'file,' it must be held to be satisfied when the certificate is left with the clerk, and that such act satisfied the requirements of the statute as to filing with him."

In the case of Bailey *vs.* Costello, 94 Wis., 87, the Court says:

"The objection to the reception in evidence, and validity, of the plaintiff's mortgage, as against the defendant, on the ground *that there was no endorsement upon it* to show that it had been filed in the town clerk's office of the town of Richland, is untenable. In legal contemplation, the filing of the mortgage was completed when it was delivered to, received by and left with the town clerk of the proper town. Marlet *vs.* Hinman, 77 Wis., 140; Smith *vs.* Waggoner, 50 Wis., 160; Goodman *vs.* Baerlocher, 88 Wis., 297; Manhattan Co. *vs.* Laimbeer, 108 N. Y., 590. Plaintiff ought not to suffer for the default of the clerk, who was a public officer, and over whose acts he had no control."

In Edwards *vs.* Grand, 53 Pac. Rep., 796, the Court says:

"An instrument is 'filed' for record when it is deposited in the proper office, with a person in charge thereof, with directions to record it. Tegambo *vs.* Mining Co., 57 Cal., 501. *Indorsing the fact and time of its deposit is not an essential part* of the filing."

See *dissenting opinion* of Judge Gilbert, Circuit Judge (Record, p 446), in harmony with the foregoing authorities, clearly demonstrating that the writ of error had been duly filed and the Circuit Court of Appeals was possessed of jurisdiction of the case.

In the recent case of *Wheeling Pottery Company* vs. *Levi*, 19 Southern Reporter, 752, it is said:

"The filing (of the petition) was overlooked by the clerk. It was handed to him in his office to be filed. It was received by him, acted upon, and was to be kept on file, and it was a document of his office. Having been placed by the attorney in the hands of the filing officer in his office, to be filed, and it having been acted upon, as already stated, and the contemporaneous facts rendering it evident that all was done in the utmost good faith, and that the omission was owing to a mere inadvertence of the officer, we think that the plaintiffs complied with the law to every intent and purpose. The absence of the 'file mark,' under the circumstances, cannot operate to his prejudice. 'Filed' is the best evidence that the document is of record, but it is not always and under all circumstances the only evidence that will prove that a petition is of record, when, owing to clerical error, it is not expressly endorsed."

We make the following quotations from opinions of Courts upon the same subject:

"But where the law requires or authorizes a party to file it (a paper) it simply means that he shall place it in the official custody of the clerk. That is all that is required of him, and if the officer omits the duty of endorsing upon it the date of filing, that should not prejudice the rights of the party."

Holman vs. *Chevaillier*, 14 Texas, 339.
Gorham vs. *Summers*, 25 Minn., 81, 86.

The section of the Judiciary Act referred to in Brooks *vs.* Norris, above quoted (1 Stats. at Large, p. 84), as well as the same statute incorporated in the Revised Statutes of the United States, in Secs. 997, 998, 999, 1000, 1007 and 1008 is no less conspicuous than Rule 14 of the Circuit Court of Appeals for the Ninth Circuit in omitting the word "file" or the term "filing" from every provision of the statute that relates to writs of error.

The Court must look outside of both the language of the statutes and the rule to find the word "file" or the term "filing" or any similar expression. We respectfully submit that a technical filing in the narrow sense of requiring a *file mark* did not enter into the contemplation of the Supreme Court when they held that a writ of error was not sued out, or in the language of the statute "brought" until filed in the office of the clerk of the trial Court. What they were seeking to do was to determine a time from which the control of the trial Court ceased, and from which the period of limitation on appeal or writ of error began to run. They properly held that neither the act of issuing the writ from the higher Court nor the attestation upon the writ fixed this time, but that placing the writ in the hands of the proper officers for obeying its command determined, viz.: the filing or lodging of the writ of error with the officer whose duty it was to obey its mandate.

What is expressed by the word "lodge" in section

1907 we contend is exactly what is meant in the opinions of the Federal Courts. The writ of error is simply lodged with the clerk for the purpose of making a return by him upon it. It is in his custody transiently and temporarily. The seeing that the writ is lodged with the clerk of the Court is doing all it is possible for the party appealing to do to make his right complete. If this were not true, a delay on the part of the clerk might rob the Appellate Court of its jurisdiction, or an honest misconception—as in this case—have the same effect.

In the case of United States Nat. Bank *vs.* First Nat. Bank, 79 Fed. Rep., 302, the Circuit Court of Appeals, Eighth Circuit, speaking with reference to this very case through Thayer, Circuit Judge, in regard to the filing of the writ of error, says:

> "We have examined the decision in the case of Insurance Co. *vs.* Phinney, 22 C. C. A., 425; 76 Fed., 617, to which our attention has been directed, but we are not able to concur in the view that seems to have been entertained by the majority of the judges in that case. We think it is altogether the more reasonable view that the substantial requirements of the law are satisfied when the record shows that the writ of error was actually lodged with the clerk, and that it is the lodgment of the writ with that officer, rather than the notation of the filing, which renders it operative."

We call attention to some of the opinions of this Court, cited in the majority opinion of the Circuit Court of Appeals, in order to show that in the view of the Judges it was the service upon the clerk of the trial Court or a lodgment with or delivery to him of the writ of error that constituted the filing. An examination of the leading case of *Brooks* vs. *Norris*, *11 How.*, *207*, will show that no other sense of the term "filing" was in the Court's mind. The language of Chief Justice Taney is that the writ of error is not brought until it is filed *in* the Court which rendered the judgment, not *by* the Court.

This meaning is very fully borne out by a reference to

the case of *Mussina* vs. *Carazos*, *6 Wallace*, *355*) wherein Justice Miller defines what is necessary to confer jurisdiction upon the Appellate Court so far as the service of the writ of error is concerned. At page 358 he says:

> "When deposited (the writ of error) with the clerk of the Court, to whose Judge it is directed, it is served; and the transcript which the Court sends here is the return to the writ, and should be accompanied by it."

Here, it will be observed, that the deposit with the clerk of the lower Court perfects the service and gives jurisdiction to the Appellate Court.

In the case of *Brandies* vs. *Cochrane*, *105 U. S., Rep., 262*, the same idea is borne out by showing how an appeal may be perfected. No formal order granting the allowance of an appeal was made, but the Circuit Judge approved the bond for an appeal and signed the citation. The opinion says:

> "The bond was on the same day filed with the clerk, and the citation served on the 18th of August. * * * * The Circuit Court, by taking the security and signing the citation allowed on appeal, no formal order of allowance was necessary."

It will be observed the Court in speaking of the filing of the bond does not state it was filed *by* the clerk but it was filed *with* him. In other words, it was lodged with him for his official action.

So, in the case of *Scarborough* vs. *Parogud*, 108 U. S. Rep., 567, the question was whether the writ of error was brought within the two years, and in fixing the date for the computation of the limitation, the Court says: The writ was not "lodged" until after the two years.

The Court expresses exactly what is meant by the filing with the clerk, not the act of the clerk in placing his file endorsement upon the writ, but that the writ was not lodged in the clerk's office until the 16th of that month.

Again, in the case of *Polleys* vs. *Black River Improvement Company, 113 U. S. Rep., 83*, the Court says:

> "Though the writ of error in this case seems to have been issued by the clerk of the Circuit Court of the United States on the 10th day of May, 1881, and is marked by him for some reason as filed on that day, it is marked by the clerk of the Court to which it is directed, viz: the Circuit Court of La Crosse County, as filed on the 29th day of that month. It is not disputed that this is the day it was filed in his office."

It will be observed it does not state this was the day it was filed *by* him, but in the sense of the other decisions it was the day on which it was filed *in* his office.

Again, in the case of *Credit Company* vs. *Arkansas Central Railway Company, 128 U. S. Rep., 261*, the Court, after setting forth that the same rule is applicable to appeals as to writs of error, proceeds to state when an appeal is taken, as follows:

> "An appeal cannot be said to be 'taken' any more than a writ of error can be said to be 'brought' until it is, in some way, presented to the Court which made the decree appealed from, thereby putting an end to its jurisdiction over the cause, and making it its duty to send it to the Appellate Court. This is done by filing the papers, viz., the petition and allowance of appeal (where there is such a petition and allowance), the appeal bond and citation. In *Brandies* vs *Cochrane*, it was held that in the absence of a petition and allowance the filing of the appeal bond, duly approved by a Justice of this Court, was sufficient evidence of the allowance of an appeal, and was a compliance with the law requiring the appeal to be filed in the Clerk's office."

In addition to the authorities citing above we submit the following:

In *ex parte* Thorn, 8 Law Rep. Chanc. Appls., 722, Sir JAMES BACON, C. J., in the Court below, said: "The file no doubt begins when the papers are handed to the Registrar." The statute provided that a certain paper might be signed prior to the filing or registration of the resolution. The Lords Justices on appeal held that it must be signed "before the resolution is either filed or registered."

This points to "filing" as consisting in handing the document to the Registrar under authority of law. (See citations in this case.)

In Irwin Executors *vs.* McGuire, 44 Ala., 499, the Revised Code provided that a person must "file" his claim in the office of the Judge of Probate within nine months. It was objected by defendant that it was not filed. The defendant proved that there was nothing in the records of the Probate Court nor among the papers on file to show that the note had been filed in the Court. The plaintiff proved that an attorney had presented the claim to the Clerk of the Probate Judge at the Probate Court to be filed against the estate. Search was made for the claim in the Probate Court, but could not be found. The Court held "that a copy of a claim against an insolvent estate, properly verified, *delivered to the Clerk of the Probate Judge*, is a sufficient filing under Section 2196 of the Revised Code."

See Flynn *vs.* Shackelford, 42 Ala., 202.

In Minnesota the statute required that a chattel mortgage or a true copy should be filed. The Court held that such mortgage was filed within the meaning of the statute when it was delivered to and received by the proper officer in his office for the purpose of notice mentioned in the statute. The Court said:

> "Irrespective of our statute, we think that an inquiry for the ordinary meaning of the word 'file' will lead to the same conclusion. 'File' meant at common law, 'a thread, string or wire, upon which writs and other exhibits in Courts and offices are fastened or filed for the more safe keeping and ready turning to the same.' (Wharton's Law Lexicon, Bouvier's Law Dictionary.) Within this definition, a paper might be said to be filed when strung upon the thread, string or wire. That particular mode of filing having almost entirely gone out of use, another mode of filing, the purpose of which is the same, has taken its place, so that, as Bouvier says, 'A paper is said also to be filed, when it is delivered to the proper officer, and by him received to be kept onfile.' This, which we take to be the present ordinary sense of the word 'filed,'

would be presumed to be the legislative sense, unless the contrary is made to appear. That the contrary does not appear is quite manifest from our previous examination of the statute. (See Green *vs.* Garrington, 16 Ohio St., 548.)

If this, our construction of the statute is, as we think it is, the proper construction, parties have a right to rely and act upon it. It is, therefore, not important, so far as the question of construction is concerned, that it would be better policy (as it perhaps would be), to make indorsing and indexing essential to the notice which it is the object of the statute to secure."

Gorham *vs.* Summers, 25 Minn., 86.

The King *vs.* Wade, 1 Barnewell & Adolphus, 861, TENTERDEN, C. J.: "I think, therefore, filing must be understood here to mean depositing for the purpose of being filed, the society doing all that is incumbent on them."

A statute in Massachusetts required a paper to be filed in the office of the Town Clerk." The Court said:

"A document may properly be said to be filed with the Town Clerk when it is placed in his official custody, and is deposited in the place where his official records and papers are usually kept. There is nothing in the statute, requiring his constant attendance, and if the paper in this case was in his custody ready for the signature of the selectmen, and if a majority of the board called at his house, signed the paper and returned it to its place of deposit in the safe, more than seven days before the town meeting, it was a sufficient compliance with the statute. It is immaterial that he was absent when they called. His wife might lawfully act as his agent for the purpose of exhibiting the paper, and restoring it when signed to its place of deposit. It is a convenient and proper practice to indorse a memorandum of the date upon the paper, but the statute does not make it indispensable."

Reed *vs.* Acton, 128 Mass., 130.

The case of Coleman *vs.* State, 2 Iowa, 91, the Court said: "He contends that the Court had no jurisdiction of the cause because the indictment does not appear to have been filed in the Allen Circuit Court. We understand a paper in a cause to be filed when it is delivered to

the Clerk and received by him to be kept with the papers in the cause, Bouv. Dic., Tit., "file."

In Adams *vs.* Goodwin, 25 S. E. Rep., 24, Supreme Court of Georgia, June, 1896, the Court held that "Where an affidavit to foreclose a chattel mortgage and the mortgage itself have been handed to a Justice of the Peace, this is a sufficient 'filing' of these papers with that officer."

Sometimes statutes do require papers to be endorsed, as in Fanning *vs.* Fly, 2 Caldwell Tenn., 488, where the Code provided that "All pleadings shall be endorsed by the Clerk when filed, with the time and date, and for want of such an endorsement, may be rejected by the Court on motion, unless sufficient cause is shown. The Court said:

> "It is insisted that this provision of the Code is imperative, and that a declaration, which accident or design may have placed on the file without the Clerk's indorsement, is not such a legal paper as the defendant would be bound to notice by plea or otherwise. A paper is said to be filed, when it is delivered to the proper officer, and by him received to be kept on file; and papers put together and tied in bundles are called a file (1 Baurice, title 'Lieb,' citing Vin. Ab., 211). The Clerk's indorsement, under our practice, is necessary to give the opposite party notice of the true time at which the declaration or plea was filed, so that he may know when to plead or reply; but it is not an absolute prerequisite to the validity of the declaration or plea, as clearly appears from the language of the statute itself. The statute, in terms, authorizing the Court, on motion, to reject a paper not so indorsed, or at his discretion, for sufficient cause shown, to retain it on the file and compel the opposing party to answer it; or the opposite party may waive his right to have it stricken off the file and plead or reply; and after plea or verdict, on judgment by default, regularly taken and entered, without motion to reject it, he must be held to have waived his right under the statute."

This case plainly shows that the "endorsement" of a paper is one thing and the "filing" of it is another.

The case of Phillips *vs.* Beene's Administrator, 38 Ala., 248, is very instructive. The Code required that the verification of a class against an insolvent estate must be filed. The Court said:

These authorities show conclusively, that a paper, not brought to the notice of the proper officer, and placed in his custody, cannot be said to be filed. As was said in the case of Holman *vs.* Chevaillier (*supra*), where the law requires or authorizes a party to file a paper, it simply means that he shall place it in his official custody. That is all that is required of him. The party cannot be prejudiced by the omission of the officer to endorse the paper filed.

In First National Bank *vs.* Hatfield, 55 Pac. Rep. 932 (Wash. 1899), an appeal was taken on April 6 and the bond was received by the clerk on April 8, but was not marked "Flled" until the 12th, owing to failure to pay filing fee until then. Held substantial compliance with statute requiring filing.

Again, in Watkins *vs.* Bugge, 77 N. W. Rep. 83, it is said the proper filing of a mechanics' lien consists in placing the sworn statement in the custody of the proper officer.

Or as was said in Brooks *vs.* Nevada, 52 Pac. Rep., 575, "The filing contemplated by the statute is the actual "delivery of the notice to the clerk, and the placing "thereon of the proper indorsement. *It must at least be "actually delivered to the clerk.*"

To same effect Townsend *vs.* Sparks, 27 S. E. Rep., 801.

C.

THE STATUTE OF JEOFAILS IS APPLICABLE IN THIS CASE.

To prevent the sacrifice of rights to constructions so technical as adopted in this case, Sec. 32 of Judiciary Act of 1789 (*Sec. 954 of the Revised Statutes of the United States*), was enacted, which is as follows:

"No summons, writ, declaration, return, process, judgment or other

" proceeding in civil causes, in any Court of the United States, shall be
" abated, arrested, quashed or reversed for any defect or want of form ;
" but such Court shall proceed and give judgment according as the
" right of the cause and matter in law shall appear to it, without
" regarding any such defect, or want of form, except those which, in
" cases of demurrer, the party demurring specially sets down, together
" with his demurrer, as the cause thereof."

Mr. Justice STORY, in *1st Gallison, at page 22*, in applying this statute, says of amendments in Appellate Courts :

" The language of this section is sufficiently comprehensive to
" sustain the app'ication for amendments in any cases before the
" Court ; but it has been attempted to be restricted to causes of
" *original*, and not to be extended to causes of *Appellate* jurisdiction.
" But we find no such distinction in the statute ; and even in Appellate
" Courts, proceeding according to the course of common law, defects
" apparent upon the record may be amended, when they come within
" the general purview of statutes."

1st Gallison, Rep., pp. 22, 23.

In *Warren* vs. *Moody*, *9 Fed. Rep., 673*, PARDEE, C. J., in construing this statute, says :

" It (the case) came up for hearing at last term, when an amendment
" of substance was allowed to the original bill, and the cause continued
" to allow the defendant to meet the amended bill by motion to strike
" out or answer or pleas, as counsel might advise. The defendant moves
" to strike out the amendment, and this motion presents the question
" whether it is allowable on appeal in equity to permit amendments to
" pleadings "

In *Kennedy* vs. *Georgia State Bank*, *8 How. 610*, it is said :

" There is nothing in the nature of an Appellate jurisdiction, pro-
" ceeding according to the common law, which forbids the granting of
" amendments. And the thirty-second section of the judiciary Act of
" 1789 (now Rev. St. Sec. 954), allowing amendments, is sufficiently
" comprehensive to embrace causes of Appellate as well as original
" jurisdiction "

So also Sec. 1005 of the Revised Statutes provides for amendments of writs of error.

It is to be noted that a writ of error can be amended in all particulars of form, and particularly "if the defect can be remedied by reference to the accompanying record."

Our contention is that the accompanying record shows the writ was lodged, and that the writ could have been amended in the particular of the file mark, if the Court thinks the file mark necessary.

Under this Statute of Jeofails the omission of the endorsement of filing should have been overlooked, or the clerk of the Circuit Court permitted to make the same as of the time he received the writ.

The judgment appealed from was rendered October 17th, 1895 (see Record, p. 92).

The writ of error bears date December 14, 1895 (see Record, p. 395), and was received by the clerk the same day (Record, p. 400), and was returned January 4th, 1896.

D.

THE CONTENTIONS OF THE DEFENDANT IN ERROR ON THIS POINT ARE UNSOUND.

1. The defendant in error has argued, Circuit Court of Appeals dismissed the writ on the ground that there was *no evidence* that the writ of error had been *filed* in the Court below.

The prevailing opinion of Ross, J., is not clear as to the *precise* ground of dismissal, but apparently holds that the writ was not *filed* in the Court below, though not defining in what *filing* consists.

The Court says: "It is quite evident, we think, from

" this affidavit * * * that the actual fact is not incon-
" sistent with the record as presented, which fails to show
" that the writ of error was there filed."

" It is urged on behalf of the plaintiff in error that, as
" the original writ was left or lodged with the clerk, it
" was, in legal effect, filed in the Court; that the indorse-
" ment is but the evidence of the filing; and that, as the
" original writ was, in fact, left or lodged with the clerk,
" it was as much filed in the Court as if it had been in-
" dorsed as filed by him."

" It may be, as already observed, that the indorsement
" of the clerk may not in all cases be essential to consti-
" tute a 'filing.' The writ of error, however, is the writ
" of the Appellate Court, and must be sent up with the
" record to this Court. It does not remain in the lower
" Court, and itself become a part of the files of that Court.
" Unless it is actually filed, and thus becomes a part of
" the record of the lower Court, there would remain in that
" Court no record whatever of such a writ, and nothing to
" show any transfer of jurisdiction from the trial to the
" Appellate Court; and, when it reaches the latter Court,
" it would contain no evidence whatever of the fact essen-
" tial to confer jurisdiction upon the Appellate Court.

" We are of opinion that, by reason of the failure to
" file the writ of error in the Court below, this Court is
" without jurisdiction of the same. Writ dismissed."

76 Fed. Rep., 620.

It is to be noted that the Court says:

Unless it is actually filed, and then becomes a part of the record of the lower Court, there will remain in that Court no record whatever of such a writ, and nothing to show any transfer of jurisdiction from the trial to the Appellate Court; and when it reaches the latter Court it would contain no evidence whatever of the fact essential to confer jurisdiction upon the Appellate Court.

It is to be noted that the Court at first says that the endorsement of the clerk may not in all cases be essential to constitute a filing. The Circuit Court of Appeals therefore says that lodging the writ with the clerk is not filing and the file mark may not be essential to constitute the filing. If neither the actual lodgement of the writ with the clerk nor the endorsement of the papers filed constitute the filing, it is somewhat difficult to understand just what in the opinion of the Court does constitute filing.

The Court says: "That unless the writ is filed, and "thus becomes a part of the record of the lower Court, "there would remain in that Court no record whatever of "such a writ, and nothing to show any transfer of juris-"diction from the trial to the appellate Court."

Now what are the facts? There is no dispute but that the original writ was lodged with the clerk of the Court below. The certificate of the clerk certifies that the transcript of the record is a correct copy of the record papers of all proceedings had in the foregoing entitled cause as the same remains of record and on file in the office of the Clerk of said Court, and that the same constitutes the return to the annexed writ of error.

Amongst these papers are copy of a bond on the writ of error reciting that the defendant has obtained from the Court a writ of error, also a copy of a citation which recites that the writ of error was filed in the clerk's office, also a copy of the writ of error. The bond on the writ of error, the copy of the citation, copy of the writ of error, all remain of record in the lower Court and they show in that Court completely the record of such a writ.

There is abundant evidence therefore by the lower Court showing the transfer of jurisdiction from the trial to the appellate Court. The record in question when it reached the appellate Court contained, as we claim, abundant evidence of the filing of the writ of error.

2. The defendant has argued that the affidavits presented cannot be considered, nor the recitals in the citation, nor the return of the clerk.

The defendant in error has cited Hudgins *vs.* Kemp, 18 How., 534. In that case a motion was made to dismiss an appeal on the ground that none had been regularly taken. Certificates and statements of the clerk outside the record and given since it was certified and transmitted to the Supreme Court were filed as evidence of the irregularity of the removal. The Court held such evidence inadmissible and said : " The record transmitted to this Court, " certified by the clerk of the Circuit Court, states that " the appeal was taken in open court. This is sufficient " evidence of that fact * * *." And the motion is made to dismiss the case not for any irregularity apparent in the record but by testimony *aliunde* offered to show that the transcript is incorrect. It is quite clear that such testimony cannot be received to support this motion.

It appeared in the Hudgins case that the certificate of the clerk was looked into by the Court for the purpose of supporting the regularity of the proceeding. The objection was that the entry on the minutes and on the order book required that the bond on appeal should be approved by the Court, but that the approval was by a Judge out of Court and therefore insufficient. For the purpose of determining this question the Court looked into the certificate of the clerk and found that the clerk had no authority to make the entry that the bond should be approved by the Court, and as approval by a Judge was sufficient the Court held the objection untenable. The Court says :

> " But the appellant had legal rights, and he cannot be deprived of " them by any irregularity in a clerical entry * * * * Such were " the legal rights of the appellant when he made his appeal and he can- " not be deprived of them by the form adopted by the clerk in enter- " ing it."
>
> " The act of March 3, 1803, which authorizes the appeals, provides

"that they shall be subject to the same rules, regulations and restric-
"tions as are prescribed by law in cases of writs of error. And in the
"case of Innerarity *vs.* Byrne, 5 How., 295, where the record trans-
"mitted to this Court did not show that a citation had been issued and
"served, it was held to be no ground for dismissing the case, and that
"the fact might be proved *aliunde*. It is not necessary that all of the
"steps required to give this Court jurisdiction should even be on file
"in the Court below, and certainly need not appear to be of record in
"that Court. (Masten *vs.* Hunter, 1 Wheat., 304)

"We think it evident, therefore, that the want of record evidence
"in the Circuit Court that the appeal was prayed, would be no ground
"of dismissal; and that the certificate of the clerk that it was so
"prayed, is all that is required in this Court."

The language of Lord MANSFIELD is applicable to this point. In Hart *vs.* Weston, 5 Burr, 2588, he says:

"It is making the practice of the court chicane, and an elusion of
"justice, instead of being a method of coming at right. I wish gen-
"tlemen would tell their clients that objections of this sort ought not
"and cannot prevail"

Or as was said by a modern Court of a similar point on pleading, it "is so dry and technical that it rattles as we write down the point" (Watkins *vs.* Bugge, 77 N. W., 84.)

POINT II.

The true construction and effect of the New York statute is that it does not require notices to be sent where premiums are demanded to be paid without the State of New York. As the Phinney premiums were demanded to be paid only in the State of Washington, it is immaterial, therefore, whether the statute was incorporated into the policy or not, either expressly or by implication.

"Assignment errors, I, Rec., pp. 366, 367: II, Rec.

pp. 367, 368; III, Rec., pp. 368, 369; IV, Rec., pp. 369, 370; V, Rec., p. 370.

1. *There is in the language of the act no basis for a distinction between domestic and foreign companies.*

2. *The act so far as it relates to foreign corporations must necessarily be limited in its operation to the collection of premiums in the State of New York.*

3. *Hence as a common rule is prescribed, the operation of the statute as to domestic companies is likewise limited to the collection of premiums in New York State.*

4. *The clause in the policy that "this policy is a "contract, made and to be executed in the State of New "York, and shall be construed only according to the char- "ter of the Company and the laws of that state," has no bearing on the question of the necessity of notice under the statute of 1877.*

5. *The statute of 1877 has never been construed by the Courts of New York to require notices to be sent outside New York State, and hence this Court should not so construe it. The Courts of other States have never decided this.*

6. *There is no statute or public policy in the sovereign State of Washington which demands the construction contended for by respondent.*

7. *The cases cited by the respondent in support of their construction of the statute of 1877 are either not well considered, or do not support respondent's contentions, which latter are not well founded.*

8. *To adopt the construction contended for by defendant in error would be "judicial legislation" of the most extreme type.*

9. *The practical effect of the construction contended for by plaintiff in error shows that such is the true construction.*

A.

THE STATUTE APPLIES ONLY TO THE BUSINESS OF COLLECTING PREMIUMS WHICH IS DONE IN NEW YORK, IN WHICH CATEGORY THE PHINNEY CASE IS NOT INCLUDED AND THE STATUTE IS ENFORCEABLE ONLY IN THE STATE OF NEW YORK BY THE COURTS OF NEW YORK.

PRELIMINARY STATEMENT.

The statute of New York in question is to be found in the Appendix hereto.

By the contract the premiums were payable in New York, but it was expressly provided that the premiums would be accepted elsewhere when duly made in exchange for the company's receipt, signed by the president or secretary (Rec. 3). But premiums on Washington policies were always accepted there, Stinson being the subagent and State General agent for that purpose (Rec., 248, 249, 250). The renewal receipts were sent in in advance from New York (Rec., 251, 259, 260, 313).

The main reliance of the defendant in error is upon Carter *vs.* Brooklyn Life, 110 N. Y., 18, *but in this case the premiums were demanded to be paid in New York*, and the case sustains the contention of the plaintiff in error.

In the Carter case, after the passage of the Act of 1876, the plaintiff remitted premiums directly to the company at New York, and the controversy was simply over whether the notice was sent to the right address.

The Brooklyn Life was a *domestic* company, and the case shows the operation of the statute as to domestic companies.

The case of De Frece *vs.* National Life, 136 New York, 144, shows the operation of the statute as to *foreign* companies.

The National Life was a Vermont corporation. The

company had a general agent in New York, and the notice was mailed in New York and the premium was payable there.

The position taken by the defendant company may be illustrated as follows:

Strictly speaking, the life of the juristic person known as the Connecticut Mutual for example ceases at one of the points at which the power of the Connecticut Legislature ceases, *i. e.*, at the New York boundary line, but New York permits this artificial creation to do business in New York on the terms amongst others that it send notices to insured or assignees where premiums are demanded to be paid in New York and the same law in the same terms regulates domestic companies. When the Connecticut Mutual for example enters the State of Washington to do business, it finds no similar law there and is under no obligation to send notices to persons like Phinney residing there, and the foreign juristic person, the Mutual of New York is in the same case. What basis then is there for the Washington Circuit Court to extend the operations of the New York statute extra-territorially as to the Mutual Life of New York when it cannot do so as to the Connecticut Mutual for example. The New York Courts have not bound it, as a matter of comity, to do so. There is no public policy in the State of Washington requiring it. There is no contract between the parties requiring it. On the contrary the parties have waived it, if it ever existed.

This regulation is a matter for separate legislation by each sovereign State.

The sovereign State of Washington has not so legislated, and the plaintiff in error contends that the sovereign State of New York in legislating in the same terms as to foreign and domestic companies, has indicated its intent that its legislation shall affect both alike, and that it did not intend to discriminate against its own citizens.

The operation of the statute is limited by its true construction to dealings with policyholders whose premiums are demanded to be paid in New York just as much as if it expressly read that the notices were to be sent only when premiums are collected in New York. In such case it would be entirely immaterial where the contract was made, and consequently from that point of view what was the proper law of the contract, or whether the business of insurance was originally done in New York.

And that is what the plaintiff in error shows in this point.

The only judicial opinions wherein the above contention is considered are the opinion of HANFORD, J., on the plaintiff's demurrer to the defendant's answer herein (reported in 67 Fed. Rep., 497), and the opinion of the Supreme Court of Washington in the case of Griesemer *vs.* Insurance Co., 10 Washington, 202, *and both opinions concede the principle contended for, viz., that the statute must have the same effect both as to domestic and as to foreign companies*, but claim that the statute applies *to business done in New York*, and that the transactions in question are "business done in New York."

The opinion of HANFORD, J., states as follows:

> "The law of New York, by its terms, *applies to all life insurance companies transacting business in that State.* It is contended that this statute, if it is made to apply to contracts of life insurance entered into outside of the State, is unconstitutional, because it will not operate equally upon all life insurance companies doing business in New York; that the Legislature has not the power to prescribe an obligation of this kind to affect a Connecticut Life Insurance Company doing business in New York and also doing business in the State of Washington, as regards the contracts of the Connecticut company made in Washington, and that, therefore, a home company would be placed at a disadvantage, as compared with a company of a different State, transacting business in New York. I think that argument is based upon false premises. *I think that the binding force of the statute applies to all companies equally.*

B.

The true construction of the New York statute is that that statute only required the notice to be sent to the insured, or assignees, whose premiums were demanded to be paid in the State of New York, and therefore it is immaterial whether the statute is incorporated into the contract or not, either expressly or by implication.

The question is, what does the Act of 1877 mean, and what basis exists in it for giving it one effect as to *domestic* corporations and another effect as to *foreign* corporations.

The Legislature of New York had full power over the subject and *could* have made one rule for domestic and another for foreign companies. It *could* have passed a law as to collection of premiums and post office addresses outside the State of New York, which would follow the domestic company everywhere, and made another rule applicable *only* to foreign corporations and to collection of premiums in New York State. The question is, did it do so?

The plaintiff in error claims that the Legislature made no distinction between domestic and foreign companies, but laid down a rule common to both alike, intended to govern collection of premiums in New York State only.

1. THERE IS IN THE LANGUAGE OF THE ACT NO BASIS FOR A DISTINCTION BETWEEN DOMESTIC AND FOREIGN COMPANIES.

The act in specifying companies to which it applies, names life insurance companies, but does not say, all domestic companies, and also all foreign companies doing business in New York, thus making a distinction between domestic and foreign companies as to the application of the act.

But it does apply one limitation, namely, "doing busi-

ness in the State of New York," and the subject matter of the act being the collection of premiums and notices the "business" referred to must relate to insured, or assignees, whose premiums are collectable there, leaving the insured or assignees, who pay their premiums in other States to be protected in the wisdom of the Legislatures of such other States. The legislative language in other statutes in New York State is different where an act is to apply to all domestic companies, governing their action everywhere, and also to all foreign companies doingbusiness in that State.

2. THE ACT, SO FAR AS IT RELATES TO FOREIGN CORPORATIONS, MUST NECESSARILY BE LIMITED IN ITS OPERATION TO THE BUSINESS OF COLLECTING PREMIUMS IN NEW YORK STATE.

It will not be pretended that it could be claimed in a Court in the State of Washington in a suit there against the Connecticut Mutual, for example, although it was doing business in New York, that it had not sent notice of a premium collectible in Washington. This shows that the phrase, "doing business in the State of New York," is not to be interpreted in every forum to classify all corporations into those doing business there in the sense of the business of insuring, and those not doing business there, making the former subject to the act and the latter not, but as pointing out the insured or assignees whose premiums are collectible in New York, as the persons to be protected. The "business" referred in the statute as transacted within the State of New York is the collection of premiums in New York State.

The Connecticut Mutual is "doing business in the State of New York," and yet it has power to forfeit policies, but not as against insured or assignees paying premiums in New York, unless notice is sent in conformity with the statute.

In the case of Phelan *vs.* Northwestern Life, 113 New York, 147 (1889) the case was that of a *Wisconsin* company, and the Court said it was "doing business in New York." It appears also that the *policyholder resided in New York*, and the controversy was over the proper mailing of a proper notice to him *there*.

We are not concerned with what the New York Legislature *might* have done, or *should* have done, nor is the Federal Court legislating in the place of the Washington Legislature, but we are concerned simply with what the New York Legislature *has* done.

By introducing foreign companies into the Act in respect to which the Legislature had power only as to collection of premiums in New York State, the Legislature indicated that it was dealing with the territorial limits of that State, and so far as all companies did the business of collecting premiums there, foreign or domestic, they must do it as prescribed by the act.

If the act had applied expressly and solely to domestic companies an entirely different question might be presented.

The defendant in error refers to the surrender value statute of New York, but that statute is wholly dissimilar in that it expressly refers and is limited to "Any policy of life insurance issued by any *domestic* life insurance corporation." There is no question on that statute as to the extent to which it applies to *foreign* companies.

The statute for New York relating to surrender value of lapsed or forfeited policies was passed in 1879 (L. 1879, Ch. 347), and the material part was as follows:

"Whenever any policy of life insurance issued after January first, eighteen hundred and eighty, by any domestic life insurance corporation after being in force three full years, shall, by its terms, lapse or become forfeited for the non-payment of any premium or any note

given for a premium or loan made in cash on such policy as security, or of any interest on such note or loan, the reserve on such policy computed according to the American experience table of mortality at the rate of four and one-half per cent. per annum shall, on demand made, with surrender of the policy within six months after such lapse or forfeiture, be taken as a single premium of life insurance at the published rates of the corporation at the time the policy was issued, and shall be applied, as shall have been agreed in the application or policy, either to continue the insurance of the policy in force at its full amount, so long as such single premium will purchase temporary insurance for that amount, at the age of the insured at the time of lapse or forfeiture, or to purchase upon the same life at the same age paid up insurance payable at the same time and under the same conditions, except as to payments of premiums as the original policy."

What is the operation of the premium notice act upon foreign companies? *Its operation must necessarily be limited to the territorial limits of New York State. The only proper subject matter of legislation as to collection of premiums by foreign corporations is collection and notice thereof in New York State* The New York Court of Appeals in holding that the provisions exempting religious, charitable and other corporations named in the Inheritance Tax Acts applied only to domestic corporations has said: "The law of this State cannot enlarge or change the powers of a foreign corporation. They are solely those given by the law of the domicile. Foreign corporations are permitted by comity to exercise their powers within this State, when not in contravention of our statutes or public policy."

In re Prime's Estate, 136 N. Y., 359.
Matter of Merriam, 141 N. Y., 484.
Matter of Ballcis, 144 N. Y., 134.

The Statute of 1877 is to be construed as to foreign corporations in the light of these principles. The statute was not enlarging or changing powers of foreign companies. It was regulating a class of business transacted *within the State* of New York, by domestic and foreign companies alike, to wit: that of collecting premiums on policies of life insurance. Thus the Ohio Court in the American Bible Society *vs.* Marshall, 15 O. S., 543, held that the New York statute of wills providing that "no devise of real estate to a corporation shall be valid unless such corporation be expressly authorized by its charter or by statute to take by devise," had no effect beyond the limits of New York State. "It is not to be presumed," says the Court, "that the Legislature of that State intended to go further." And it was held that the Bible Society could take lands by devise in Ohio.

The New York Legislature did not intend that foreign companies should send notices of premiums payable everywhere. All that the statute declared was a rule of conduct in New York State, in favor mainly of its residents. No more did it intend that domestic companies should send the notices of premiums collectible everywhere. There is no intimation in the Act as to any difference in its operation as between foreign and domestic companies.

Realty Co. vs. *Appolonio*, 5 *Wash. Rep.*, 437.

3. HENCE AS A COMMON RULE IS PRESCRIBED, THE OPERATION OF THE STATUTE AS TO DOMESTIC COMPANIES IS LIKEWISE LIMITED TO THE COLLECTION OF PREMIUMS AND NOTICE THEREOF IN NEW YORK STATE.

The above reasoning as to the construction of the law of 1877 is fully supported by the New York Courts in the leading case of Vanderpoel *vs.* Gorman, 140 N. Y. 563, where the Court construed a New York statute providing that no corporation should make any transfer or assignment in contemplation of insolvency, and held that *it applied to domestic companies alone.* The Court said:

"There is nothing in the section limiting its scope and effect to "such property as the foreign corporation might have within this State. "It is a broad enactment affecting every assignment made by a cor- "poration under the circumstances mentioned. Can it be supposed "that the Legislature had in mind a foreign corporation and intended "to assume a jurisdiction to declare such an act, even when done out- "side this State, and in respect to property also outside of its boun- "daries, to be void and of no effect? This cannot be supposed, for "we cannot impute to the Legislature such ignorance upon the subject "of its inability to give extra-territorial effect to its own laws. And "if it had foreign corporations in mind when proposing to legislate "upon the subject, and knew it could not affect the validity of such "transfers outside this State, and intended to provide that such trans "fers should not carry the title to property of the corporation held "within this State and subject to our jurisdiction, it must be clear "that language somewhat appropriate to express such purpose would "have been used. The language actually used was neither apt nor "pertinent for this purpose. It is both appropriate and pertinent when "applied to domestic corporations only."

In the case at bar foreign corporations were expressly included by the same terms as domestic companies, and as the Legislature must have intended to limit the operation of the statute as to foreign companies (see reasoning in Vanderpoel *vs.* Gorman) it must have had the like intent as to domestic companies.

So in an analogous case, Bank of Louisville *vs.* Young, 37 Mo., 407, the Court said: "That it was not intended to "place corporations on a different footing from indivi- "duals in regard to extra-territorial contracts." Similarly as we have argued, there is nothing in the act of 1877 tending to show that it was intended to place foreign and domestic companies on a different footing as to extra territorial business. To the same effect Judge DENIO in Bard *vs.* Poole, 12 N. Y., 503.

application

4. THE CLAUSE IN THE POLICY THAT "THIS POLICY IS A CONTRACT, MADE AND TO BE EXECUTED IN THE STATE OF "NEW YORK, AND SHALL BE CONSTRUED ONLY ACCORDING

"TO THE CHARTER OF THE COMPANY AND THE LAWS OF THAT STATE," HAS NO BEARING ON THE QUESTION OF THE NECESSITY OF NOTICE UNDER THE STATUTE OF 1877.

The point is, What is the meaning of the statute? If it means as we contend that a common rule shall apply to domestic and foreign companies as to premiums collectible in New York State and not elsewhere, then it is immaterial whether the effect of this clause is to incorporate the statute or not. If it means as defendant in error contends, its incorporation is equally immaterial.

The claim that this clause made the statute applicable to Washington, when otherwise it would not have been, is preposterous. There was no agreement by this clause that what the New York law required us to do in New York alone we would voluntarily do in Washington and every other State in the Union. And yet this is what defendant in error's contention would come to.

Whether it was a New York contract or not is entirely immaterial on this point. The question whether the policy was a New York, or Washington, or Ohio or Pennsylvania contract for example is not essential from this point of view to the determination of any case.

Many Courts have held for the purpose of giving effect to foreign laws that policies have been contracts governed by foreign laws. Under such decisions these contracts might be respectively New York or Washington or Pennsylvania or Ohio contracts for example. If corporations issuing such contracts are to bear the burden of foreign laws they should also be held Washington or Pennsylvania or Ohio contracts for the purpose of having the benefit of the absence in foreign States as in such case Washington or Pennsylvania or Ohio, of special regulations as to notices.

5. THE STATUTE OF 1877 HAS NEVER BEEN CONSTRUED

BY THE COURTS OF NEW YORK TO REQUIRE NOTICES TO BE SENT OF PREMIUMS DEMANDED OR PERMITTED TO BE PAID OUTSIDE NEW YORK STATE, AND HENCE THIS COURT SHOULD NOT SO CONSTRUE IT.

This Court is called upon to decide the meaning of a New York statute.

The construction contended for by respondent would in effect be a discrimination by New York against her own companies. The presumption is that New York did not intend any discrimination against her own companies. As in an analogous case VON BAR has said: "It is impossible "to suppose that our subjects should have been intended to "be put at a disadvantage with the Fisk (fisc) of another "country" (Von Bar's International Law, 2d Ed., p. 237).

The Court of Appeals in People *ex rel.* Badische Fabrik *vs.* Roberts, 152 N. Y., 63 (1897), has declared the policy of New York State to be one of general equality as to domestic and foreign companies.

This Court should not extend the operation of the statute by the construction defendant in error demands.

Thus where the question was as to the meaning of a New York statute the Minnesota Court said that it was "not free from doubt" and "whether that is the effect of "the legislation of New York we cannot settle by any de- "cision we may make. Only the Courts of that State can "authoritatively determine. In the absence of any ju- "dicial construction of the law by the Courts of that State "or of a practical administration of it in a manner preju- "dicial to foreign corporations, our retaliatory act should "not be deemed applicable if it is felt to be doubtful how "the statutes of New York should be construed, even "though we might be of the opinion that their *probable* "effect is to restrict the operation of foreign corporations "to a narrower field than that allowed to this respond- "ent."

State *vs.* Fidelity Co., 89 Minn., 544.

There is no decision in the State of New York adverse to our contention binding this Court.

6. THERE IS NO STATUTE OR PUBLIC POLICY IN THE SOVEREIGN STATE OF WASHINGTON WHERE THE PREMIUMS WERE SOUGHT TO BE COLLECTED WHICH DEMANDS THE CONSTRUCTION CONTENDED FOR AGAINST THE PLAINTIFF IN ERROR.

A foreign company in the State of Washington is obliged to file "a certified copy of its charter, articles of "incorporation, memorandum of association or certificate "of incorporation" (Hill's Statutes, Sec, 1525). This includes, of course, foreign insurance companies, as to which there is a special provision (*Id.*, Sec. 2715).

The suggestion that the New York statute is to be considered as any part of the charter of appellant is without foundation. (As stated above, the words "has power" were stricken out in the revision of 1892 as immaterial and of no force.)

The State of Washington does not permit a foreign insurance company to transact business in Washington on more favorable conditions than are prescribed by law for domestic insurance companies (*Id.*, Sec. 1524). There is no requirement that domestic companies shall send any notices to residents of Washington, or of premiums permitted to be paid there.

The policy of the State of Washington is liberal towards foreign companies, and the construction contended for is wholly at variance with such policy, and would introduce a most unjust discrimination between New York companies and other companies in the State of Washington.

If there was any public policy on this point manifested by the statutes or decision of the State of Washington a different question might be presented.

7. THE CASES CITED BY THE DEFENDANT IN ERROR IN SUPPORT OF THEIR CONSTRUCTION OF THE STATUTE OF 1877 ARE EITHER NOT WELL CONSIDERED, OR DO NOT SUPPORT HIS CONTENTION.

In the case of Griffith *vs.* New York Life Insurance Company, 101 Cal., 627, the Court entirely fails to perceive the scope of the act, and that domestic and foreign corporations are placed on the same basis. It appears, however, that the premiums were payable in New York. That Court begged the question when it stated "the statute is a limitation on the power of the company, etc.." The question is not whether it is a limitation on the power, but what is the extent of the territorial operation of the statute. The extent is the same as to domestic and foreign, *i. e.*, business of collecting premiums in New York State.

The defendant in error has claimed: "Does the State "of Washington, when, as a matter of courtesy to other "States, she permits the insurance corporations of such "States to come within her boundary to trade with her "citizens, permit them to come in like freebooters?"

Certainly not; but, according to the respondent, the Equitable, the New York, the Mutual, would be "freebooters," unless their construction prevails, while the Connecticut Mutual, the Northwestern Mutual, the Provident, the New England Mutual would at the same time, we suppose, not be "freebooters."

Why the Court should be urged to be astute to legislate against New York companies in favor of Massachusetts, New Jersey and Wisconsin companies one can hardly see. For this statute imposes a technical burden of labor and expense, and one wholly unnecessary, for the substance of it is voluntarily assumed by companies, and it is for Legislatures to impose it, if at all.

The law cannot under any construction be made by the

Court to apply to companies chartered outside of New York, who collect premiums in Washington. What object, then, to turn and twist the statute so as to operate against New York companies alone? It is for the sovereign State of Washington to protect her residents by legislation against all foreign corporations.

The words "have power to" in the first section of the Act of 1877 are of no special force or meaning. *They were stricken out in the revision of 1892 and do not now appear in the law.*

Hebb *vs.* Insurance Co., 138, Pa. St., 174, is manifestly obscure bad law, and the construction of the Pennsylvania statute is an instance of flagrant judicial legislation, unsupported by any reasoning whatever. The statute reads "that all life and fire insurance policies "upon the lives or property of persons *within* "*this Commonwealth*, whether issued by companies "organized under the laws of this State, or by "foreign companies doing business therein." The property was in West Virginia. The decision is sound only in case the insured resided in Pennsylvania. And if so the cause is really authority for our contention notwithstanding the erroneous general language of the Court. The life or property or person insured must reside in Pennsylvania. The Pennsylvania Act is really based on the same general lines as those on which we contend our New York statute is based, namely a common rule applicable to foreign and domestic companies exactly alike. Spokane, etc., Lumber Co. *vs.* McChesney, 1 Wash. Rep., 609, declares that the decision of another State construing a statute contrary to its plain import will not be followed in construing a similar statute subsequently enacted here.

In the Ficklin case (Insurance Co. *vs.* Ficklin, 74 Md.) the statute expressly applied to all policies of domestic companies, and there was no question whatever as to

the scope of the statute as between foreign and domestic companies.

In the case of Washington Bank *vs.* Hume, 128 U. S. 195, the Connecticut statute which related to the rights of married women regulated this natute of the contract and applied to "any policy of life insurance," and the company itself printed the statute on the policy.

In Warner *vs.* National Life Association of Hartford (100 Mich., 157), the Michigan Court is deciding in reference to a contract made by a foreign corporation (foreign both to New York and Michigan) in the State of New York, and governed by the laws of that State, as the Court holds. It appears from the report of the case that the insured evidently resided in New York State, the notice sent was mailed to his address in New York State.

Courts of States other than New York have erroneously held the premium notice statute applicable to New York Companies on the broad ground that the particular policies were New York contracts or that the business of insurance was done in New York.

This construction is impracticable and unreasonable. (See 9 below.)

It is submitted that in view of the foregoing argument the test of the operation of the statute is not the answer to an inquiry as to what is the proper law of the contract, or whether the business of insuring was done in New York in the sense that the contract was made there, but where were the premiums sought to be collected or permitted to be paid?

In the case of Equitable Life *vs.* Nixon (81 F. R., 796) the statute was held applicable by Federal *Court in Washington* on the ground that policy was a New York contract, and the point here discussed was not in any way raised. The Trimble case (55 Pac. Rep., 429) simply followed this. In the Trimble case the notice mailed *required*

payment in New York City. The same is true of the Provident Life *vs.* Nixon (44 U. S. App., 318) when there was no discussion whatever of the point, but the notice was mailed in New York City and required payment in New York City.

In the Mullen case, 89 Texas, 261, the Phinney case was expressly followed, the Court only saying: "We think the "provisions of New York statute, *under the facts* shown "in this case, entered into and became a part of the contract "between the parties."

In the Griffith case, 101 Cal., 627, the statute was assumed to apply as the premiums were payable in New York and there was no discussion whatever on the subject.

In the case of Goodwin *vs.* Provident Life, 66 N. W., 157, the Court held the contract a New York contract, and the *statute* was conceded by counsel to apply. The same is true of N. Y. Life *vs.* Smith, 41 S. W., 680.

Courts of States other than New York have also erroneously held the premium notice statute applicable to companies foreign to New York, on the broad ground that the particular policies were New York contracts, or that the business was done in New York.

This construction is impracticable and unreasonable (see 9 below).

The Court of Michigan in Warner *vs.* Association, 100 Mich., 157 (1894), held a premium notice law of New York applicable to a Connecticut company because as it alleged the contract was made in New York ,but the notice was mailed to New York.

The defendant in error attempted to support its construction of the statute in the Court below in part by the following propositions:

(1.) "It is of quite as much importance that a policy-"holder in Washington should have timely notice and "warning as a like policyholder in New York." But

there may have been some considerations which appealed even more strongly to the New York Legislature, as, for example, the burden which would thus be thrown upon companies in the way of a precise following of the statute, and the record of affidavits and all the machinery of the act to be set in motion in many different States, with the only result that the statute would be a trap for the companies, to be mulcted in large sums for which no consideration is given, and where no insurance is intended, or believed to continue to exist by either party as in this case. The fact that the Legislature included *foreign* companies is decisive that whatever may have been its motive it intended the statue to be operative only in New York State. It is well known that insurance oompanies send several notices to all policyholders. This is because it is in the interest of a company that its insurance should not lapse. But it is a different thing to impose a technical statutory burden and enable speculative claims for insurance to be enforced without consideration.

(2.) "Would it be fair to the vast army of the policy-"holders * * * to pass laws for the protection of "only its own residents?" This question involves only a partial view of the interests of policyholders. The United States is filled with insurance corporations. Competition is keen, necessary expenses are large, though relatively small to the business done. New York State cannot be presumed to have intended a heavy burden on the policyholders of its companies which it could not impose upon policyholders of foreign companies. New York said we will cast additional protection around all New York policyholders, for they are in the main those whose premiums are collectible there, foreign and domestic, without discrimination as to protection or expense. And we will regulate the business of collecting premiums in the State of New York.

(3.) Insurance companies ever since the statute was "enacted have so understood the law and complied "therewith."

There is no proof of this in the record. It is not true. What is true is that policyholders have always been dunned with notices to pay premiums. The successful progress of a life insurance company depends on its insurance staying. The effort of companies lies in the direction of holding business and using every effort to do so. It is, and has been for years, the practice of all companies to send "first notices," "second notices," "default notices," "renewal notices," and urge policyholders to continue their insurance. The evils of forfeiture have been remedied by surrender value laws. The important remedy applied has been to relieve against the *effects* of forfeiture, not to prevent its taking place. This case and the batch of cases now here pending on application for *certiorari* indicate clearly that the claims presented are not based on an unreminded forgetfulness of a policyholder, but on attempts to obtain a construction of a statute which will, through its alleged violation by the companies, result practically in insurance by paying premiums *after death*.

8. To ADOPT THE CONSTRUCTION CONTENDED FOR BY DEFENDANT IN ERROR WOULD BE "JUDICIAL LEGISLATION" OF THE MOST EXTREME TYPE.

Judicial legislation is substantially equivalent to a Court exercising legislative functions.

The construction contended for could not be upheld without sanctioning judicial legislation, against which this Court has often pronounced itself.

9. THE PRACTICAL EFFECT OF THE CONSTRUCTION CONTENDED FOR BY PLAINTIFF IN ERROR SHOWS THAT SUCH IS THE TRUE CONSTRUCTION.

The statute imposes the duty of sending notices. The presumption is that the Legislature intended that such duty could readily be ascertained. The companies both foreign and domestic who have policyholders whose premiums are collectible in New York on whose part offices and addresses are there, are under the construction contended for, easily able to distinguish such policyholders and keep proper lists of the same.

But if the duty to send notices only exists in cases where the contracts are New York contracts, and where the statute of New York is the proper law of the contract, or when the business of insurance can be said to have been done in New York, then a duty is imposed impracticable of fulfillment. How can a domestic company, and still less how can a foreign company, readily or at all classify its contracts on this basis, for the purpose of sending notices? The canon of construction is that statutes must have a reasonable construction.

Point III.

UNDER THE CIRCUMSTANCES SURROUNDING THE APPLICATION FOR INSURANCE, AND DELIVERY OF THIS POLICY IN THE STATE OF WASHINGTON, IT WAS A WASHINGTON CONTRACT AND UNDER THE PRINCIPLES GOVERNING THE APPLICATION OF THE STATUTES OF A PARTICULAR STATE TO A PARTICULAR CONTRACT, THE NEW YORK STATUTE WAS NOT APPLICABLE TO THIS POLICY.

It has been shown before that the true construction of this statute is that it requires notices to be sent only

of collections in New York State, or applies only to business of collecting done in New York, or is enforceable only by the Courts of New York. It is immaterial therefore whether that statute is the proper law of the Phinney contract or not, as Phinney was not a resident of New York, the business of collecting was not done there, and the suit was not in a New York Court. But it is also manifest that

(A.)

The proper law of the Phinney contract was the law of Washington which required no notice.

(B.)

The statute of 1877 is no part of the charter of the plaintiff in error, or a limitation on its power to contract.

(A.)

The proper law of the Phinney contract was the law of Washington which requires no notice.

Assignment Errors VIII Rec., p. 373.

This question was raised by numerous requests for instructions to the jury, properly submitted to the Court below, and refused, and by exceptions taken to the instructions given by the Court to the jury, upon which error has been duly assigned, and the errors claimed are fully set out in Specification of Errors, paragraphs, I, II, III, IV, V, VII, XXII, XXIII and XXVI.

The theory upon which plaintiff in error tried the case, in so far as this point is concerned, was that the contract was a contract made in the State of Washington, and in

no wise controlled or governed by the provisions of this New York statute. The Court adopted the theory diametrically opposed to this, and instructed the jury, in effect, that the contract was a New York contract, and subject to the same statute as though made in New York with a citizen and resident of that State. If the contract is a Washington one, then the premium notice law does not apply. For, as was said in Equitable Life *vs.* Nixon, 81 F. R., 798, "In the State of New York, there is "such a statute, and hence the principal question in the "case is whether the policy in suit was a New York con- "tract, and to be ruled in accordance with the statute of "that State, or to be governed by the principles of the "common law, which are in force in Washington in re- "spect to such contracts of insurance."

There is no dispute between the parties as to the manner of the making of the contract. It is a conceded fact that the application for the policy was made by the insured, a resident of the State of Washington, to a local agency in that State; that this application was forwarded to the General Agent for the Pacific Coast at San Francisco, and by such General Agent to the home office of the company at New York; that a policy was issued from the home office, forwarded to the General Agent at San Francisco, and by him transmitted to the local agent at Seattle *to be by him delivered to the applicant upon payment of the premium there;* that this local agent delivered the policy to the insured at Seattle, *and there collected from him the premium.* The application contained these words:

"The contract * * * *shall not take effect until the first premium shall have been paid* and the policy shall have been delivered during my continuance in good health."

It is settled by the great weight of authority that a policy of a company incorporated under the laws of one

State and doing business in another, applied for and delivered under circumstances such as are stated above, to the insured, a resident of the latter State, where the premiums are paid, is a contract of the State of the residence of the insured and governed by the laws thereof, *even in cases where the policy itself provides that it shall be governed by the laws of the State where it is issued.* The making of such a contract is business done in the State of its delivery, and not in the State where it was issued.

Ins. Co. *vs.* Clements, 140 U. S., 226.
Ins. Co. *vs.* Berry, 50 Fed., 511; 1 C. C. A., 561.
Ins. Co. *vs.* Robinson, 54 Fed., 580: affirmed, 58 Fed., 723; 7 C. C. A., 444.
Hicks *vs* Ins. Co., 60 Fed., 690; 9 C. C. A., 215.
Thwing *vs.* Ins. Co, 111 Mass., 93.
Heebner *vs.* Ins. Co., 10 Gray (Mass.), 131
In re Breitung's Estate, 46 Northwestern, 891 (Wis.).
Hurst *vs.* Life Ins. Co. (Md.), 26 Atlantic, 956, 958.
Ins Co. *vs.* Sawyer, 160 Mass, 413.
Equitable Life Ins. Co. *vs.* Winning, 58 Fed., 541; 7 C. C. A., 359.

A reference to the above adjudications will clearly demonstrate that whenever insurance companies have attempted to import into such contracts, *for their benefit and advantage*, that is in the case of such a mutual company as this for the benefit of the whole body of policy holders, the laws of their own States, the Courts have invariably and without exception refused to apply such laws, and have applied the laws of the State where the insurance was effected, the policy delivered and the premiums paid. No reason is apparent why this rule should be changed or relaxed for the benefit of the insured, especially in a case like this, where the representative of the alleged insured is seeking a benefit and advantage which she could not obtain under the terms of the contract, and under the laws of her own State.

We respectfully insist that the construction of this con-

tract in this respect is governed by the facts attending its execution, uninfluenced by any consideration as to whether the insurer or the insured may be benefitted thereby. We can say of this contract as did the Supreme Court of the United States of the contract in the Clements case above cited that upon this record the conclusion is inevitable, that the policy never became a completed contract, binding either party to it, until the delivery of the policy, and the payment of the first premium in Washington, and consequently, the contract is a Washington contract and governed by the laws of Washington.

In the case of Northwestern Mutual Life Ins. Co. *vs.* Elliott, 5 Fed. Rep., 228, the application for the policy was made in Oregon, the policy was forwarded to the agent in Oregon and delivered there. The Court said: "Where, "then, was this contract made, in Wisconsin or Oregon? "The answer to this question involves the inquiry, Where "did the final act take place which made the transaction "a contract binding upon the parties?

"The premium was paid to the agent of the plaintiff at "Portland, who then and there countersigned and deliv- "ered the policy. This was the consummation and com- "pletion of the contract. But, to put this beyond a doubt, "the policy itself declares that it shall not be binding "upon the company until these acts are performed. And "until it was binding upon the company it was not bind- "ing upon the applicant; in short, it was not yet a con- "tract, but only a proposition."

See also

Pomeroy *vs.* Manhattan L. Ins. Co., 40 Ills., 400.
Thwing *vs.* Great Western Ins. Co., 111 Mass., 109.
Wood F. Ins., 189 and n. 2.
Hardie *vs.* St. Louis M. L. Ins. Co., 26 La. An., p. 242.
St. Louis M. L. Ins. Co *vs.* Kennedy, 6 Bush, 450.

Upon the authority of the above case, as well as the

other cases cited, we contend that the policy in suit is a Washington contract, and that it is uncontrolled by the foreign statute and it must be effective according to the language used by the parties thereto. They having contracted that it should become void and inoperative upon a certain contingency, and that contingency having happened, the Court below committed reversible error in refusing to instruct as requested by plaintiff in error, and in instructing in effect, that the policy was a New York contract, and governed and controlled by the statute of that State, and was not forfeited by failure of the assured to pay the premiums when due.

Those cases holding policies to be New York contracts, and the New York premium notice therefore applicable, are cases where the circumstances surrounding the issuance of the policy are different from those at bar.

The broad ground upon which Courts other than those of New York State have held New York statute applicable has been that the policies were New York contracts, or business done in New York, although it is also true that in the bulk of these cases the premiums were being collected in New York. The Phinney policy was neither.

In the Nixon case (81 F. R., 796) the contract was held not a Washington contract, but a New York contract. This was based upon a "binding receipt" which did not exist in the Phinney case.

In the Phinney case, on the contrary, no money was paid at the time of application, and transmitted to New York. In the Phinney case the policy was transmitted to Washington, and upon *delivery there*, the *premium was paid there, and the policy took effect there.* The application stated, "which (the policy) shall not take effect until "the first premium shall have been paid." Under the doctrines of the Nixon case, therefore, the Phinney policy was a Washington policy governed by its laws, and the language of the Nixon case, "there is no statute of Wash-

"ington affecting that provision of the policy which de-"clares that, 'if any premium or instalment of a premium "on this policy shall not be paid when due, this policy "shall be void,'" is applicable to the Phinney policy (Record, p. 4.)

In the Equitable Life *vs.* Trimble, 83 F. R., 85, the Nixon case was followed.

In Provident Savings Life Association *vs.* Nixon, 44 U. S. Appeals, 319 (Ninth Circuit, 1896), where the opinion was delivered by Mr. Justice McKenna of this Court, no question whatever was raised except whether the proof showed the notices were *mailed.*

In Mullen *vs.* Mutual, 89 Texas, the Phinney case was simply followed.

In Griffith *vs.* New York Life, 101 Cal., 640, the statute was assumed to apply, and there was no discussion of this point whatever.

In Warner *vs.* Association, 100 Mich., 157 (1894), which was the case of a company foreign to New York, the Court simply said, "the contract of insurance was made in the "State of New York, and is governed by the laws of that "State."

In Goodwin *vs.* Provident Life, 66 N. W., 157, the Court held the contract a New York contract, *as it was agreed in the policy that it should be construed to have been made in the State of New York.* This was not so in the Phinney policy.

In N. Y. Life *vs.* Smith, 41 S. W., 680 (Texas, 1897), it was assumed that the statute was applicable.

See also the comments on the above cases in Point II.

The defendant in error, however, erroneously contends that the law of New York above recited does, notwithstanding the principles announced in the foregoing cases, govern this contract, alleging that the parties to said contract expressly agreed therein that it should so govern it.

To maintain this position reliance is placed upon the following clause in the application:

"This application is made to The Mutual Life Insurance Company, of New York, subject to the Charter of the Company and the laws of the State of New York."

The language relied on, relates in terms to the application for the policy, and not to the policy, which are two distinct and separate things.

It does not purport to be a stipulation in the application attempting to control the effect of the policy. The application is a written proposal or offer of the insured which is accepted by the issuance of the contract. It is true that it is, in this case, a part of such contract and is part consideration thereof, and stipulations therein contained purporting to limit or control the effect of the policy may have that effect.

Considered by itself, however, the application contains merely the data upon which the real contract is based.

It is not essential to the validity of the contract, and a policy is valid, though issued without it.

May on Insurance, Secs. 29, 159, 167, 168. (2d Ed.)

By reference to the other clause in the application hereinbefore quoted relating to the delivery of the policy, it will be seen, however, that this application does contain clauses purporting to control the policy, and these, as has been stated, are effectual for that purpose.

It appears that it was the express intention of both parties to this contract that while the application was made subject to the laws of New York, *i. e.*, subject to the charter of The Mutual Life Insurance Company and the laws amendatory thereof, the contract or policy issued thereon was to become consummated and in force wherever said contract should be delivered and the premium paid; and, as a matter of law, the policy was to be subject to the

laws of the place of such consummation, in this case, the State of Washington. It thus appears from the application, that while it is made subject to the laws of the State of New York, a different stipulation was inserted with regard to the policy, according to which, it may or may not, according to the place of its delivery, become a contract "subject to the laws of New York."

That the clause in the appplication, "this contract shall "not take effect until the first premium shall have been "paid and the policy shall have been delivered," is of controlling force, especially in Federal Courts, appears from the cases hereinbefore cited.

By the terms of the policy, also, it is provided, "the "annual premium shall be paid in advance on the *delivery* "of this policy." If this contract, then, is to be governed by the law of the place of the delivery thereof, as would appear from the cases above cited, then, by the express agreement of the parties, such law was to be, not the law of New York, but the law of the State of Washington.

It is also contended that the contract is governed by the laws of New York, because the loss was payable in that State; that this was the place of performance. It is clear, however, that it was the intention of both parties that so far as payment of the first premium constituted performance, performance was to be begun in the State of Washington, for the first premium was to be paid on the delivery of the policy; and it was also provided that payment of the other premiums might be made in exchange for the company's receipt at places other than the State of New York, which was the State of Washington in this case as has been shown. It is proved that the general agent at San Francisco and the local agent for Washington both sent notices to Phinney of the approaching due date of the premium, and providing for its payment in Washington, that Phinney received the notices and before the due date

negotiated with our agent Stinson in Washington with respect to the payment of the premium, in whose hands was the company's receipt for delivery upon payment.

It appears, therefore, that the place of performance by plaintiff's testator of his part of the contract in paying the second premium, was agreed to be in Washington.

Liverpool Steam Co. *vs.* Phenix Ins. Co. (129 U. S., 397, 458) is instructive upon this question, it being there held directly that the law of the place of the making of the contract, so far as the nature, obligation and interpretation of the same are concerned, governs the contract, and that a contract or agreement made in one country between citizens or residents thereof, the performance of which begins there, is to be governed by the law of that country, notwithstanding performance is to be completed in some other country and then the law of each country governs as to the contract to be there performed.

And the Supreme Court in the same case, at page 455, quote approvingly the decision of Mr. Justice Bradley, in the case of Morgan *vs.* Railroad Co. (2 Woods, 244), in which it was held that a contract made in New York, by a person residing there, with a railroad corporation having its principal office there, but deriving its powers from the laws of other States, for the conveyance of interests in railroads and steamboat lines, the delivery of property and the building of a railroad in those States, and which, therefore, might be performed partly in New York and must be performed partly in the other States, so far as it concerned the right of one party to have the contract rescinded on account of non-performance by the other party, was governed by the law of New York, and not by either of the diverse laws of the other States in which parts of the contract were to be performed.

B.

The defendant in error erroneously contends further that the statute is made a part of this contract, by necessary implication, if not expressly, because that statute is a limitation on the Company's power to contract, and as much a part of every contract made by plaintiff in error as its charter.

This is not a proper or reasonable construction of the New York statute. Is that statute one intended to regulate everywhere the existence of every New York corporation, to constitute part of its organic law, like its charter, a limitation of its power to contract in any jurisdiction, or was it enacted for the enforcement of a local policy only, applicable to all companies, both domestic and foreign, "doing business," as it says, in the State of New York, that is, collecting premiums therein? Clearly the latter.

It is reasonable to suppose that the intent of the makers of this law was that it should operate equally upon all corporations within the sphere of its influence, and that it was not intended to operate, where, considered with reference to the objects it was originally intended to effect, its operation must necessarily be partial and impose a burden upon its own corporations, from which all others would be exempt. It must be admitted as we have shown above that a Connecticut corporation, though doing business in New York, would not, by reason of this statute, be bound in Washington by such a contract as this.

The act in terms does not apply to corporations chartered by the laws of New York; on the contrary, its terms are purely local; "doing business in the State of New York" is made the test of its applicability. No distinction is made by it between domestic and foreign corporations; it is intended to affect all corporations, domestic and foreign alike, and consequently to operate only where it could affect all alike; that is, in the State of New York.

This New York statute, therefore, not being one to regulate or determine the existence of New York corporations, but being one to apply to all corporations, both domesfic and foreign, and only so far as they did business in New York, it did not enter into and does not govern this contract made by this corporation, outside of that State, and the premiums on which were being collected in the State of Washington.

A statute of Iowa provided that "All insurance com-"panies or associations shall, upon the issue, or renewal "of any policy, attach to such policy or endorse thereon, "a true copy of any application or representation of the "assured which by the terms of such policy are made a "part thereof, etc."

An Iowa company did not so attach the application, *but the Colorado Court did not hold this provision a part of the charter of every Iowa corporation, and did not hold this a limitation upon the power to contract, and as by the laws of Colorado no statements need be attached to the policy, it held the laws of Colorado and not those of Iowa governed.* This holding is in harmony with the contentions of the plaintiff in error.

Des Moines Life Ass'n *vs.* Owen, 50 Pac. Rep., 210 (1897).
U. S. Mtge. Co. *vs.* Sperry, 24 Fed., 838; affirmed 138 U. S., 313.
White *vs.* Howard, 38 Conn., 342 (461)
Ohio Life Ins. Co. *vs.* Ins. Co., 11 Hump. (Tenn.), 24.
American Bible Society *vs.* Marshall, 15 Ohio State, 543.
Bank of Louisville *vs.* Young, 37 Mo., 407.
Vanderpool *vs.* Gorman, 140 N. Y., 563.
Warren *vs.* The Bank, 38 N. E. Rep., 122 (Ill.).
Morawetz on Corporations, Secs. 967-968 (2nd Ed.).

The United States Mortgage Company *vs.* Sperry, above cited, is particularly in point. The Mortgage Company was chartered by the State of New York, with power to loan money upon real estate anywhere within the United States. Its charter prohibits its loaning money at a rate of interest exceeding the legal rate. The legal rate of in-

terest, as established by the law of New York, was seven per cent. per annum. It loaned money in the State of Illinois at ten per cent. per annum, which rate was legal by the laws of that State, but illegal under the laws of the State of New York, and it was therefore contended but not held that the rate of interest contracted for upon the Illinois loan was in violation of its chartered powers.

May it not be said, with equal force, that the general statute of New York, prohibiting life insurance companies, doing business in that State, from forfeiting insurance policies, except upon certain conditions, had for its object to regulate the collection of premiums there upon insurance policies, which would necessarily mainly be upon the lives of persons residing there, and not elsewhere; and that when New York created The Mutual Life Insurance Company of New York, with power to write policies anywhere in the United States, and by general law prohibited any insurance company doing business of collecting premiums in that State from forfeiting policies, except upon certain notice, it did not intend to withhold from said company the power to contract in other States, for insurance upon terms less favorable than those States permitted in respect to insurance there contracted for, by other companies.

The contention of defendant in error that the plaintiff in error, being a New York corporation, its contracts are to be construed as if this statute of the State of New York were incorporated therein, is founded upon the assumption that this statute was intended by the Legislature of New York to be and become a part of the charter or organic law of this and other New York corporations, and that such a statute is, therefore, a limitation upon the powers of the plaintiff in error to make contracts.

Defendant in error is not justified in making this assumption. That is one of the very questions in issue here. The contention of the plaintiff in error as to the true intent and meaning of this statute appears elsewhere in this brief.

In the case of Relfe *vs.* Rundle, the Supreme Court of the United States held that a Missouri statute relating to corporations chartered in that State should be given effect in the State of Louisiana by a Federal Court sitting in the latter State. The Court, however, expressly based this decision upon the fact that the law in question was, in legal effect, a part of the charter of the corporation, and intended by the Legislature to affect all corporations chartered by that State wherever they might do business; and for this reason it gave effect to such law as against a Missouri corporation in the State of Louisiana. The question still remains, however, notwithstanding this and similar cases, whether or not this New York statute became and was, under the rules hereinbefore stated, a part of the charter of all New York corporations, or was intended to be a rule of local policy applicable to all corporations, both domestic and foreign, doing business of collecting premiums in the State of New York.

In the case of Fry *vs.* Insurance Company, above cited, a Connecticut statute was held in the Circuit Court of Missouri to govern in the distribution of the assets of an insolvent Connecticut corporation as between an insurance commissioner suing in a Connecticut Court, and a subsequent attaching creditor in Missouri. Here, also, the decision is based upon the same ground. The Court says: "With respect to this company, it is no doubt true that the act in question forms a part of its charter to the same extent as if it was expressly incorporated therein." And further "it is in terms made applicable to every life insurance company chartered by the State of Connecticut."

The Connecticut law considered and construed in this case, purported in terms to regulate the existence of all companies chartered by that State. The distinction between that case and the case at bar is evident.

In the case of Railroad Co. *vs.* Gebhard, *supra*, the

Supreme Court, upon the ground of international comity, held as binding in New York, and as against minority bondholders there, a Canadian statute determining and regulating the existence of a Canadian corporation, and which became and was in fact, a part of its charter.

In Washington Central Bank *vs.* Hume, *supra*, a policy was issued and delivered in Connecticut, and contained an express provision that it (the policy) was to be in all respects construed and determined in accordance with the laws of that state—a stipulation which is conspicuously absent from the policy now under consideration. The Court says: "Under these circumstances the laws of Connecticut were a part of the contract"; and further, "The rights and benefits given by the laws of Connecticut in this regard are as much a part of these contracts as if incorporated therein, not only because they are to be taken as if entered into there but because there was the place of performance, and the stipulation of the parties was made with reference to the laws of that place."

Here the question was as to performance, to whom to perform, who was entitled to the insurance?

Here also it is plainly seen that the decision of this case proceeded upon the ground that the policy was made in Connecticut, and upon the further ground that the policy contained an express stipulation that it should be governed by the laws of that State.

The Connecticut statute which related to the rights of married women applied to "any policy of life insurance," and the company itself printed the statute on the policy.

The dictum in Hebb *vs.* Ins. Co., *supra*, appears to uphold the contention of defendant in error, but it does not, because it does not appear in the reported case that the contract was not made in the State of Pennsylvania, where the decision was rendered. It appears, indeed, that the property insured was situated in another State, but it does not appear that the contract itself was not made in the State which enacted the law.

In the Phinney case the provision as to waiver shows that the parties did not intend to contract with respect to the laws of New York State. It may be said that this clause is a recognition of the N. Y. Statute. It can be equally said that it implies that the parties did not know what was the conclusion of the law, whether it was part of the charter or not, but wanted to be on the safe side in providing that it should not govern this contract.

POINT IV.

If this Court should hold contrary to the contention of the plaintiff in error as above maintained in Points I, II and III that the New York statute applies to this contract and to collection of premiums in Washington from residents of Washington, then it is submitted that the equitable and true construction of the statute is as follows:

(A) It was not the intention of the Legislature to keep the policy alive, and its provisions unimpaired even after successive defaults in paying the premiums. This would be an inequitable construction of the statute.

(B) *This intention is clearly shown by the amendment of 1897.*

(C) The notice in the statute of 1877 referred to forfeiture of premiums already paid on policies, or the reserve thereon, and to nothing else.

(A.)

It was not the intention of the Legislature to keep the policy alive, and its provisions unimpaired, even after successive defaults to pay the premium.

This would be an inequitable construction of the statute.

No Court has ever held contrary to this construction of the statute.

A statute is to be enforced not according to the letter always. The literal construction of this statute as claimed by the defendant in error produces results which are too unjust to have been contemplated. The meaning of the statute is to be ascertained by the co-relation of the laws relating to the subject matter, and by the evident intent of the law-maker. It is to be enforced only to that extent. In the State of New York this statute has been substantially construed as above claimed in (A) as follows:

In the first case, Carter *vs.* The Brooklyn Life Ins. Co., 110 N. Y., 15, the facts were that the policy in question was subject to an annual payment of $82.80, to be paid on the 25th of October in each year, and it contained the usual clause of forfeiture. The annual premiums were regularly paid from 1870 to 1883; and it will thus appear that there were thirteen years' premiums received by the company, of which, in accordance with the lucid opinion of the Supreme Court in the case of the New York Life Insurance Company *vs.* Statham, heretofore quoted there was a large accretion of these premiums over and above the amount necessary to carry the risk lying in the hands of the company unabsorbed by the cost of carrying the life for that length of time, and which in ordinary insurance parlance is called the "reserve." The notice was not given but before the next installment of premium became due a tender of the amount was made and a reinstatement of the policy demanded. Upon the refusal of the company to reinstate the policy an action in equity was brought to

compel them to do so; and the Court held that they were compelled to do so, and the Court held rightly under this statute. In this case the premiums were compelled to be paid in New York. The collection of the premiums yearly was being had in the State. But that is the extent to which the statute goes. Before another installment becomes due, the unpaid premium should be tendered as well as the coming due premium, at least, upon the date when the latter was due. A reinstatement of the policy after these tenders does not shock the moral sense, or violate our notions of justice or equity. Before the next premium becomes due restitution may be sought to be made, and an application to the equitable powers of the Court to restore the policy may be made.

In the second case Phelan *vs.* Northwestern Mutual Life Ins. Co., 113 N. Y., 147, the Court decided that the statute operated upon foreign companies doing business in New York, and which issued the policies in that State, delivered them there and received payment for them there. It appears from the record that Phelan resided in New York *and the premiums were collectible there.* In that case the premium was due on December 30, 1892, and it was not paid; but it was tendered to the company about two o'clock on January 15, 1893, just fifteen days after it became due, but was refused. The assured died on the night of that day. It was held that the policy was in force.

It is well to bear in mind here the familiar doctrine that "the opinion of the Court must always be read in connection with the facts upon which it is based."

Doyle *vs.* Continental Ins Co., 94 U. S., 538.

Applying this familiar principle to the Phelan case, the decision of the court illustrates the true function of the statute. Here was a case where there was a large accretion of premiums in the hands of the insurance company; here

was a default in the payment of the premium, and within a very reasonable time a discovery of the default, and an attempt to place the policyholder right again with the company, and a tender of the premium with that end in view. Here was an attempt to rectify the mistake which had been made, and it was done within a reasonable time, and payment of the premium due was tendered so as to lay the foundation for the continuation of the contract.

In the third case, Baxter *vs.* The Brooklyn Life Insurance Co., 119 N. Y., 450, the action was brought by an assignee of the policy, who resided in New York and whose premiums were collectible there. The insured died on the 7th of September, 1884, and the premium was due and unpaid on the 24th of August, 1884, a few weeks only. It was held here that the plaintiff could recover, in consequence of the failure to give the notice required by the statute; but the Court was divided upon several questions involved. The Court, however, declared by the Judge writing the majority opinion that the purpose of the statute was to establish a rule which would preserve to the assured the benefits of the premiums paid, and gave him an opportunity to save them from forfeiture by payment within the specified time. It was held there that it was not necessary to tender the amount of the premium due before the action was brought. The Court consisted of seven Judges, and the decision was by a bare majority, three Judges dissenting—Chief Judge Andrews and Judges Earl and Gray.

Says Judge ANDREWS: "The construction placed on "the statute in the prevailing opinion that by its opera- "tion the premium does not become due until after notice "and the expiration of thirty days, and that meantime "an action may be brought and a recovery had on the "policy, although the premium has not been tendered, "is, I think, untenable. * * * It is a condition prece- "dent to the maintenance of such an action that the plaint-

"iff must before suit brought have paid or tendered the "premium unpaid." * * * He is not required to "show that it was paid or tendered on the day fixed in "the policy, because the statute relieves him from that, "but he must aver and prove that the payment was made "at some time before the action was commenced, or else "no right of action has accrued. This construction fully "accomplishes the purpose of the statute, while it re- "lieves it of the anomaly that a contract to pay an insur- "ance on condition of the payment of the premiums may "be enforced, although the condition has never been per- "formed."

There is another case, De Freece *vs.* National Life Ins. Co., 136 N. Y., 150; but there is nothing in that case which varies from the general view of the statute taken by the Court on this point in the cases above cited.

It thus appears that there is a settled construction as to the right to be relieved from a forfeiture by the Courts of the State of New York under this statute, provided that prompt and immediate relief is sought. It is not determined with safety how long a time one may rest after the default is continued before some step should be taken to rehabilitate himself by the policyholder. It will be seen that a powerful minority of the Court objects to the maintenance of an action where the premium has not been paid or tendered before action brought; and there can, therefore, be said to be no settled rule of construction in New York upon this clause of the policy. In such a case it is manifest that the Courts of the United States, before whom the policy may be brought, are themselves to construe the policy in accordance with the principles of law applicable to such construction.

The forfeiture is forbidden by the statute for the non-payment of any premium, unless notice is given. It does not extend its prohibition beyond the singular number, and the non-payment of a second premium unpaid a year

after the first, is not touched upon by the statute. Unless the Court can say from this statute, taken in connection with all the laws relating to life insurance, that it was the intention of the legislature to keep the policy alive and its provisions unimpaired even after successive defaults to pay the premium, the plaintiff below should not have recovered. Will the law bear this construction? Can the judicial mind contemplate such a violent interference with personal rights as being within the contract, unless it is plainly so expressed in the statute.

(B.)

The intention to preserve the contracts only for a year, is clearly shown by the Amendment of 1897.

The Laws of 1897, Chapter 218, which took effect April 8th, 1897, amended the Laws of 1892, Chapter 590, Section 92, and will be found in the appendix hereto.

The claim which we make under this point is that this Act of 1897 is declaratory of the principle stated in "A" above, and also declaratory of general doctrine in Point I, for statute of 1897 says: "post office address in this State," that is, New York, and that the previous premium notice statute of 1877 must be read in the light of the Act of 1897.

The last sentence of the Act of 1897 must be read in connection with the first part of the act.

The main *reason* for the passage of the act was this:

Under the Acts of 1876, 1877 and 1892 insurance companies sent notices irrespective of the question whether they were legally obliged to do so or not, but sometimes they happened to be too informal, or were not sent in time. So that not only were there occasionally *bona fide* cases where New York policyholders, at least, should

have recognition, but there was a class of cases of which the Phinney was one where policyholders had been dunned *ad nauseam* for their premiums, and abandoned their contracts, yet after death, parties had attempted to get insurance for nothing by raising some technical question as to notice, though years had elapsed without the payment of premiums.

The nature of the insurance contract requires *annual* payments (or semi or quarter-annual for convenience merely), and the Act of 1897 was passed in recognition of this principle and of the principle stated in "A," above. The statute of 1897 did away with these attempts to get insurance for nothing, and declared that if the policyholder had the thirty days' previous notice in which to prepare for the payment and pay, the loss was his at the end of that time.

But suppose the company *did not send the notice* in cases where it was obliged to, or sent an informal notice, or one not in time, the policyholder in New York was not to keep on for years, perhaps, refusing or neglecting to pay premiums and yet the policy be kept alive, but he must *before* the next premium becomes due pay up, or litigate the question as to whether there had been a forfeiture or not.

If the second premium day came and the first premium was not paid, where *there had been no legal notice*, then the policy would be forfeited.

The bar to suit is in the last sentence and carries out the early part of the statute. The language is:

> "within one year from the day upon which default
> "was made in paying the premium * * * *for*
> "*which it is claimed that forfeiture ensued.*"

Not that a suit can be brought within one year after a *forfeiture*, for there is no claim.

But the words "forfeited policy" means policy claimed to be forfeited by the company. The policy-holder has *a year* to demonstrate that no *legal* notice was sent, if the company claims it was.

The claim made here has been already sustained in the Oregon State Court in the case of Hathaway vs. *New York Life (unreported). In that case only one premium was paid and the last default was in 1892. The suit was begun April 8, 1899, more than one year after the last default. The Court found as a conclusion of law as follows:* "*That this action was not brought within one* "*year from the date upon which default was made in* "*paying the premium due upon said policy, for the non-* "*payment of which it is claimed that said forfeiture* "*ensued, and is barred for that reason.*"

This Court will be asked to sanction this doctrine in the Cohen and Sears and probably other cases now pending on application for certiorari.

The operation of the bar in the last sentence is concretely shown in the Sears and Cohen cases, in which applications for *certioraris* are now pending in this Court. In both the Sears and Cohen cases suits were not begun within a year from default.

The facts in these cases are briefly as follows:

In the Sears case suit was begun Sept. 25th, 1898. Default existed from May 18th, 1893, to May 18th, 1897, the insured dying March 30th, 1898. The suit was begun Sept. 5th, 1898. The action was commenced, therefore, more than *six years after the first default* and *sixteen months after default* in the premium due May 18th, 1897, which was after the Act of 1897 was passed, and which was the last premium due before the insured's death, March 30th, 1898. The suit was not begun, therefore within a year from the last default.

In the Cohen case suit was begun November, 1898.

Default existed from Dec. 10th, 1892, to June 10th, 1897, the insured dying Sept. 21st, 1897. No suit, therefore, was begun until some *five years after the first default*, and some *seventeen months after the default* in June, 1897, which was after the passage of the Act of 1897, and which was the last premium due before the insured's death, Sept. 21, 1897.

In order to see the operation of this statute, we will discuss its applicability to the Sears case.

Under the Act of 1897, if there is a controversy as to whether a premium is forfeited or not, such an action must be begun to determine such controversy within one year from the date of the default in the payment of the premium. The policy was issued May 18th, 1891, when the first annual premium was paid; the annual premium falling due May 18th, 1892, was paid, but no part of any premium subsequent to that time was ever paid or tendered. The final default was on May 18, 1897, and no suit was begun until September 28th, 1898, some sixteen months afterwards. After the final default Sears, until his death, March 30th, 1898, and his executors thereafter, until May 18th, 1898, might have had the right to litigate the propriety of such default, but not having done so their right to do so was barred. The reason upon which the statute is based clearly is that policy holders must pay their premiums on their due date, or must before a second premium becomes due, litigate any question of forfeiture arising out of the non-payment of the previous premium.

The insured, Stephen P. Sears, died March 30th, 1898; action was commenced September 28th, 1898. It is thus seen that no premium had been paid for five years previous to the death of the insured, or for more than that time previous to the commencement of this action. It will be borne in mind that the express stipulation of the contract is, that non-payment of the premium when due

renders the policy void. If, then, a right of recovery exists, it must be through the statute of New York, and upon the terms prescribed by the statute, and the suit must be brought within the time prescribed by the law which constitutes a part of the statutory right. It is through the grace of the legislature of New York that the right of action upon the forfeited policy is given, if at all, and one who relies upon it must bring himself within the terms of that statute; one of which is the time of taking advantage of the favor it bestows.

Counsel for the defendant in error in this case claims that the Premium Notice Law of New York governed the Phinney contract, and it is claimed that it governed the Sears & Cohen contracts.

Under the doctrine in various New York cases the law of 1876 applied to then existing New York policies, and under the doctrine in the Rosenplanter case the statute is at all times within the control of the legislature, and as the legislature can cast a burden on the company as to existing policies it can from time to time modify that burden or abrogate it entirely.

The statute being general in its terms must apply to a pre-existing default, as well as to one which occurred subsequent. Under the doctrine of

Sohn v. *Waterson*, *17 Wallace*, *596*,

by which it is held that a statute of limitations, general in its terms, begins to run, as to a pre-existing cause of action, from the time when it is first subjected to the operation of the statute. The fact that this statute names the time of default as the time when the limitation of one year begins to run, does not preclude its application to pre-existing causes of action.

This view seems to be emphasized by the insertion made by the amendment of 1897 to the first sentence of

the act, viz.: "No life insurance corporation shall, *within one year after the default in payment of any premium* * * * *declare forfeited any policy*," *etc.*

The contract provides that the non-payment of a premium shall forfeit the policy. The statute qualifies this right of contract by declaring that the default must be brought about by a certain form of notice. Now, this restriction upon the right to contract is itself qualified by the further provision that the benefits of the statute must be invoked within one year from the time when the default was declared. It would seem, therefore, that if one year has elapsed *from the time when the statute went into effect* it would bar any cause of action, whether the insured was then living or not; for if the company unjustly forfeits a policy during the life of the insured he has a cause of action within one year from the attempted forfeiture, and the fact that he dies, and the right of action is then vested in his beneficiary, should not alter the rule.

In other words, we understand that the amendment to the statute is purely one of repose, and intended to compel any person interested in a policy which has been forfeited contrary to its provisions to assert his right by suit within one year.

Under the doctrine in the Rosenplanter case, therefore, the law of 1897 became the law applicable to all existing contracts thereafter made or renewed. Whatever right the statutes give to a notice the law of 1897 couples with it the burden of a bar extinguishing such right within a year after default, and the class of cases which are applicable are Boyd *vs.* Clark, 8 Federal Reporter, 852, which states as follows:

> "The true rule I conceive to be this: that where "a statute gives a right of action unknown to the "common law, and, either in a proviso to the sec-

"tion conferring the right or in a separate section, "limits the time within which an action shall be "brought, such limitation is operative in any other "jurisdiction wherein the plaintiff may sue."

And as was said in the case of Glenn *vs.* Liggett, 135 U. S., 548:

"The rights of the parties in the present case "must be adjudicated according to the require- "ments of the statutes and jurisprudence of Vir- "ginia which State created the corporation, and in "reference to whose laws the contracts of the sub- "scribers to stock were made."

So also in Halsey *vs.* McLean, 12 Allen's Reports, 440, as follows:

"Wherever the common or statute law of one "government enters into and forms a part of a con- "tract which is brought before the tribunals of "another for enforcement, and is not there treated "as immoral or contrary to public policy, the *lex* "*loci contractus* is resorted to, to determine its "validity and construction, however that may differ "from the law prevailing in the forum of the remedy. "The contract of the New York corporation in the "present case must, however, receive the same con- "struction, and the liability of the defendant here "must depend upon the same principles, whether "it was actually made in Massachusetts or in New "York; because, if made here, it was in legal con- "templation made with reference to the New York "acts, and in view of the contingent liabilities "thereby imposed upon officers and stockholders, "which are equally applicable to contracts entered "into within and without the sovereignty which in- "corporated the company (Hutchins *vs.* New "England Coal Mining Co., 4 Allen, 580)."

So also in Eastwood *vs.* Kennedy, 44 Md., 571:

"But where the contract is made in reference to "the *lex loci*, that is, where that law regulates the "contract, defining the rights of the parties there- "under, and prescribing the remedies, it necessarily "enters into its essence, forming a constituent "element thereof, and the contract and the rights "of the parties thereunder must be enforced accord- "ingly."

See also cases cited below.

The amendment by Chapter 218, Laws of 1897, is as follows:

"No action shall be maintained to recover under a forfeited policy, unless the same is instituted within one year from the day upon which default was made in paying the premium, installment, interest or portion thereof for which it is claimed that forfeiture ensued."

The Sears policy was issued prior to the amended statute of 1892 but that statute and its amendment of 1897 are applicable, as it was "renewed" after the enactment of 1892. Without the payment of the annual premium the policy lapses, but by means of such payment it is restored, reinstated, continued, or, in the language of the statute, renewed; such is the interpretation given by the courts of New York to this word as employed in the statute.

We quote from *Carter* vs. *Brooklyn Life Ins. Co.* (*110 N. Y., 15*), *17 N. E., 396*:

"We are also of the opinion that the payment of each annual premium constituted a renewal of the policy within the meaning of the term "renewed" as used in the act. While it was provided by the policy that it should continue for the term of the natural life of the insured, it was expressly provided that this was upon the condition that he should pay the annual premiums as they became due by the terms of the policy. A failure to pay such pre-

miums in any year was declared to render the policy null, void and of no effect; but, when paid, it continued, by force of such payment, the policy in existence for the period of another year. This process each year revived or renewed the policy as it approached the period of its agreed termination. It is not according to the popular notion of the meaning of the word "renewal" that it can take place only after the death or expiration of the subject to which it is applied. Thus to renew a note, a lease or a contract, it is not essential to wait until they have respectively expired; for, after that time, it would be practically impossible to renew them. A new note or lease may be made or contract created, but they would have force and effect from the new creation, and not from the original agreement. To renew, in its proper sense, is to refresh, revive, or rehabilitate an expiring or declining subject; but is not appropriate to describe the making of a new contract, or the creation of a new existence. Webst. Dict.; Worcest. Dict. It would be at the option of an insurance company to re-execute a forfeited contract of insurance; and, if the act was held applicable to such a policy alone, it would confer no legal right whatever upon a policy-holder. It was the evident object of the act to make it apply to some existing policies, and confer some legal right upon their holders, to avoid a cause of forfeiture; and if it be held to apply only to lapsed policies, it leaves it entirely optional with the company whether there should be any renewed policies thereafter or not. We are therefore of the opinion that the plaintiff's policy was renewed within the meaning of the act" (p. 399).

And such is the view adopted in *Rosenplanter* vs. *Provident Life Insurance Co.*, cited from above.

"The statute did not provide that the interest of the insured shall not be forfeited upon failure to *renew* the policy by the payment of the stipulated payment."

The right of action being derived through the statute, the time in which it must be brought becomes a part of the statutory right, and unless suit is instituted within such time the right of action is lost.

In addition to the cases cited above it is to be noted that in distinguishing the rule of limitation with respect to actions given by the common law and those under the statute, in *Finnell* v. *Southern Kan. Ry. Co.*, *33 Fed.*, *427* the court says:

"There is also another class of cases in which a cause of action, which does not exist at common law, is created by the laws of a state. Causes of action of that character only exist in the manner and form and for the length of time prescribed by the statutes of the state which created them, and if suit is brought on such causes of action in a foreign jurisdiction the limitation act of the state which created the cause of action may, of course, be pleaded (p. 428)."

And in *The Harrisburgh*, *119 U. S.*, *199*, this Court expresses the rule as follows:

"The statutes create a new legal liability, with the right to a suit for its enforcement, provided the suit is brought within twelve months, and not otherwise. The time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all. No one will pretend that the suit in Pennsylvania, or the indictment in Massachusetts, could be maintained if brought or found after the expiration of the year, and it would seem to be clear that, if the admiralty adopts the statute as a rule of right to be administered within its own jurisdiction, it must take the right subject to the limitations which have been made a part of its existence. It matters not that no rights of innocent parties have at-

tached during the delay. Time has been made of the essence of the right, and the right is lost if the time is disregarded. The liability and the remedy are created by the same statutes, and the limitations of the remedy are therefore, to be treated as limitations of the right" (p. 214).

It is impossible to understand the force and effect of the successive acts of 1876, 1877, 1892 and 1897 upon the rights and remedies of policyholders unless these acts are all read together as a part of one system, and it is for this reason that had the application for certioraris now pending in the Cohen, Sears, Hill and Allen cases been granted by this Court, counsel for the plaintiff, in error herein would have asked to have had said cases advanced so that this Court might have had before it all the statutes upon the same subject. This is not absolutely necessary, however, as this Court takes judicial notice of the statutes of the State of New York.

(C.)

The notice in Statute of 1877 referred to forfeiture of premiums already paid on policies or the reserve thereon and to nothing else.

The true construction of statutes often does not appear upon the surface. One has often but little idea of the scope or effect of a statute from a mere *cursory perusal* thereof. In order to reach its real meaning one has to be familiar with all the other statutes upon the same subject, in force at or pre-existing the time of the passage of the statute in question. To construe it properly there should be an appreciation of the exact quality of the evil against which the statute was aimed, its extent and its mischief.

If the statute is a penal one, that is, if it forbids the doing of some act which otherwise it would be lawful to do, then it has to be strictly construed. If it is a remedial statute then it is to be construed so as to bring about the remedy which the statute was intended to procure. But, above all things, the statute must be construed in a spirit of justice. It must not be extended beyond the remedy which is sought to be enforced, and particularly it is not to be extended so as to do injustice, or inconvenience, or absurdity. We are not to suppose that the Legislature, in attempting to remedy a wrong, itself committed a greater wrong, or that in its attempt to remedy a hardship it has committed injustice. All this is familiar learning.

Now, let us look at this statute in the light of these principles. Contracts of insurance are made for the purpose of securing a principal sum to be paid on the death of the life insured, and, in order to secure this principal sum to be so paid, annual or semi-annual or quarterly installments of premium are paid to the company on fixed days. It is absolutely necessary, in order to conduct the business successfully, that such premiums should be so paid on the day they are due, because life insurance takes into account not only the average of human life, but compound interests upon the installments which are paid. To leave out either element would destroy the scientific theory upon which life insurance is based. The contract is not for a fraction of a year or from one installment period to another; although there is that sort of insurance called "term insurance," and this statute expressly excludes that sort of insurance from its provisions. But the insurance for life is the insurance which we are now to deal with; and the policy in this case shows exactly what was to be done by both parties to the agreement. The contract is in two parts. One is a proposition in writing made in Seattle, in the State of Washington, September 22, 1890, and

signed by Guy Carleton Phinney and adddressed to The Mutual Life Insurance Company of New York. The statements made in that application are offered as an inducement to the company to grant the application for insurance; and the policy, when issued, recites that this application is the consideration for granting the policy. The policy provided that the premiums were due and payable at the home office at the city of New York, but would be accepted elsewhere when made in exchange for the company's receipts; which was the case with Phinney and then the following provision was in the policy: "Notice that each and every such payment is to be "made at the date named in the policy, is given and "accepted by the delivery and acceptance of this policy, "and any further notice required by any statute is there- "by expressly waived." *It has a still further provision that "if this policy shall become void by non-payment of premiums all payments previously made shall be forfeited to the company, except as hereafter provided."*

Now, here is the forfeiture which the statute refers to. This is the forfeiture which it is aimed against, and this is the forfeiture which the statute forbids the companies to enforce. What is it? It is not the right to make a contract with the company, or to continue a contract already in existence. The statute prevents the forfeiture. Of what? Why, of the premiums which have heretofore been paid on the policy, and of nothing more. There is nothing more to forfeit. To give such a construction to this statute, that not only is the forfeiture waived, which in this case amounted to one year's premium, but that an effect shall be given to the policy the same as if the premiums were regularly paid on each succeeding installment day provided in the policy, would be to give it a construction contrary to reason and contrary to justice. It would be a violation of the rights of the insurance company

which is unnecessary in order to accomplish the non-forfeiture of the premiums. It is not necessary to go to this length in order to sustain the statute. The statute was intended to provide that notice should be given of the recurrence of the payments, so that the policyholder should not be taken by surprise, or affected by forgetfulness, oversight or sickness, and thus prevented from paying his premium on the very day it was due. It was an extension by the statute of an equitable interposition to prevent the forfeiture. This cannot be construed to bring about a greater forfeiture than it was made to prevent. It cannot be construed, without violating reason and justice, to mean that the policyholder was forever discharged from his obligation to pay the premium because of the failure of this notice. There is something to forfeit. There is an accretion in the hands of the company of the surplus paid on each succeeding year the policy has been in force, which is forfeited unless the premium is paid. And to make sure the payment of which, the clause of forfeiture was inserted in the policy. *It is to prevent that forfeiture that the statute was passed, and in this case one year's premium has been paid. To do equity between the parties, you must deduct from that one year's premium the cost of carrying the insurance for one year as if it were a term policy, and then the amount of surplus which remains in the hands of the company, and which by the contract it has power to forfeit but for the statute, would be the amount of the proper recovery in this case.* (See record, p. 336.)

This is rendered clear by the decision of the Supreme Court of the United States in the case of the New York Life Insurance Company *vs.* Statham, 93 U. S., 24. The policy in this case had become by its terms void, and the reserve, or surplus, in the hands of the company had been forfeited to the company in consequence of the condition

of the country being in a state of war with the Southern States. The Court said it was not proper that the policy should be revived, ro that upon the policyholder's offering the amount of the accrued premiums which had been withheld, together with interest thereon, the policy should be reinstated. Mr. Justice Bradley, on behalf of the Court, exhibits not only his clear knowledge of equitable principles and their application to the ordinary affairs of life, but also his profound knowledge of life insurance. He says: "But whilst this is true, it must be conceded that promptness of payment is essential in the business of life insurance. All the calculations of the insurance company are based on the hypothesis of prompt payments. They not only calculate on the receipt of the premiums when due, but on compounding interest upon them. It is on this basis that they are enabled to offer assurance at the favorable rates they do. Forfeiture for non-payment is a necessary means of protecting themselves from embarrassment. Unless it were enforceable, the business would be thrown into utter confusion. It is like the forfeiture of shares in mining enterprises, and all other hazardous undertakings. There must be power to cut off unprofitable members, or the success of the whole scheme is endangered. The insured parties are associates in a great scheme. This associated relation exists whether the company be a mutual one or not. Each is interested in the engagements of all, for out of the co-existence of many risks arises the law of average, which underlies the whole business. An essential feature of this scheme is the mathematical calculations referred to, on which the premiums and amounts assured are based. And these calculations, again, are based on the assumption of average mortality and of prompt payments and compound interest thereon. Delinquency cannot be tolerated nor redeemed, except at the option of the company. This has always been the understanding and the practice in this department

of business. Some companies, it is true, accord a grace of thirty days, or other fixed period, within which the premium in arrear may be paid, on certain conditions of continued good health, &c. But this is a matter of stipulation, or of discretion, on the part of the particular company. When no stipulation exists, it is the general understanding that time is material, and that the forfeiture is absolute if the premium be not paid. The extraordinary and even desperate efforts sometimes made, when an insured person is *in extremis*, to meet a premium coming due, demonstrates the common view of this matter."
the Court in that case: "Non-payment at the day involves "forfeiture, if such be the terms of the contracts." Then the Court goes on to show what there is in the hands of the company to be forfeited, surplus premiums over the amount which was necessary to carry the expired risk, and which is called in insurance circles the "reserve." That reserve is equitably the property of the insured; and when he is forced to go out of the company by the unforeseen exigencies of a war he is entitled to take that amount with him.

That is all that could have been forfeited under any circumstances by the contract. Now, the statute comes in and says that the company shall not forfeit that, unless it gives notice. This is a very different thing from saying that unless it gives notice the contract shall be continued to the end of the life of the party insured, and if at any time hereafter he shall die, the whole amount of the insurance shall be paid over after deducting the back premiums. If he lived long enough to make those premiums equal to the amount of the principal sum, the company would never hear of him. If he died within a few years, as Phinney died in this case, then the company would hear of him as it has heard in this case, with a claim for the amount insured, without any attempt whatever to pay the premiums, which are confessedly unpaid and in arrears. No

legislature could ever have meant such injustice. There must be some limit to the time of rehabilitation. To prevent a forfeiture is not to decree a continuance of the contract all on one side, with no payments on the other. There is no language in the statute which will bear the construction that it was intended to apply to more than one failure to pay premium or to peeserve to the policy holder more than his reserve.

This statute is as we have shown elsewhere, highly penal as regards the company. The penalty cannot be exacted more than once while the first overdue premium remains unpaid. The statute was exhausted upon the failure to give the notice in September, 1891, and until the assured paid that premium he could not claim the benefit of the statute for the failure to give notice of the payment due a year after in 1892. This would be construing the statute as if it contained the language "that the company is forbidden to forfeit for each and every premium unpaid for which proper notice had not been given."

The penalty is inflicted upon the company solely to prevent the forfeiture by inadvertence, mistake or forgetfulness. It was not intended to release the insured from all future liability. There can be no continuous credit given for the premium on the ground of a continuous failure to give notice.

Fisher *vs.* N. Y. C. & H. R. R. Co., 46 N. Y., 644.

In this case the Legislature had forbidden railroad companies to charge more than two cents a mile for passengers, and inflicted a penalty of fifty dollars for disobeying the law. A passenger rode again and again upon the railroad and then sued for the accumulation of penalties, but the Court of Appeals held that only one penalty could be recovered, for in the quaint language of Judge GROVER, who wrote the opinion, people should not be permitted to keep a "book account" of penalties.

POINT V.

If this Court holds that the true construction of the statute required a notice to be sent to Phinney unless waived, then it is claimed by the plaintiff in error (A) that the sending of any statutory notice was waived by Phinney by the express terms of the policy, and (B), that actual knowledge possessed and acted upon by the insured obviated the necessity for statutory notice.

The policy sued upon by defendant in error and set forth in her amended complaint contained the following clause:

> "Payment of Premiums: Each premium is due and payable at the home office of the company in the city of New York, but will be accepted elsewhere when duly made in exchange for the company's receipt, signed by the president or secretary. Notice that each and every such payment is due at the date named in the policy is given and accepted by the delivery and acceptance of this policy, and any further notice required by any statute, is thereby expressly waived."

(A.)

THE SENDING OF ANY NOTICE WAS WAIVED BY PHINNEY BY THE EXPRESS TERMS OF THE POLICY.

The argument in support of this contention is, in brief, that the Court of Appeals of New York has never held that this statute could not be waived, nor has any Circuit Court of the United States, except the circuit from which this appeal is taken, and in a case where the Court gave no reason for its holding. Nor has any State Court ever held this statute could not be waived, except that of California. That the statute can be waived is supported by sound reasoning and decisions on analogous statutes.

Upon the trial of this cause plaintiff in error, among other requests to charge, submitted the instructions set forth at large in Paragraph VI, Specification of Errors. This instruction the court refused to give. An exception to such refusal was taken and error duly assigned thereon.

The court should have given the instruction requested. Even if it should be held, notwithstanding the authorities hereinbefore cited, that the statute of New York is applicable thereto so as to require the sending of the notice provided for by such statute, *unless waived*, the right of the insured to insist upon such notice before forfeiture, was effectually waived by the terms of the contract entered into between him and the company.

(1.) *The Court of Appeals of New York has never decided that the notice statute could not be waived by the parties.*

Hence there is no public policy of the State of New York opposed to our contention. This Court is not, therefore, bound by any judicial construction of the Statute but is free to adopt our contention.

(2.) *The learned Judge who tried this case entirely mistook the language of the New York statute.*

In his charge to the jury he said: "Notwithstanding the provisions of the statute of New York, that a provision in the policy itself waiving notice has no effect, etc." (See Rec., p. 353.)

The statute of New York does not contain any such provision.

The law of 1877 does provide that after a premium becomes due, a notice can be sent stating that unless premium is paid within thirty days the policy will be forfeited. The law then goes on to provide that if payment is made within thirty days, "the same shall be taken to be in full "compliance with the requirements of the policy in respect "to the payment of said premium or interest, anything "therein contained to the contrary notwithstanding," that

is, if payment is made within thirty days after notice, it shall be sufficient, no matter what the policy says in respect to payment of premiums, but the legislature does *not* say that notice shall be sent, anything in the policy to the contrary notwithstanding.

The above is the only allusion in the charge of the learned Judge to the question of waiver.

The learned Judge mistook entirely the meaning of the language of the Court in the Baxter case, on page 455 of the report of that case.

(3.) *This notice statute was one which could be waived.*

No Circuit Court of the United States has ever decided that this statute cannot be waived except the Circuit Court of Appeals, from which this appeal is taken. In the case of Equitable Life *vs.* Nixon, 81 Fed. Rep., 796, the same Court, per Ross, C. J. (where the question arose not on a contract of waiver in the policy, as in this case, but upon facts discussed in B below), said: "The statute of "New York presents the condition upon which a policy "may be forfeited for the non-payment of a premium. "The statute is mandatory and controls the contract. Its "provisions are not subject to be set aside or waived by "the company, or the assured, or by both together." Quoting cases discussed hereafter. The above is simply a dogmatic statement of the law. "The statute is mandatory," the Court says, but the statement is supported by no reasoning.

Phinney accepted as the contract by which his rights and those of his representatives were to be determined a policy which, by its unmistakable language, dispensed with the necessity of the insurer giving any notice required by any statute. It was entirely competent for the applicant to make a contract by which the rights, privileges and benefits conferred upon him by this statute were waived.

This statute was passed solely for the benefit and protection of the individual in his private capacity, and could be dispensed with without infringing on any public right or public policy. The public policy of the State would be in no way contravened by its waiver. The person for whose benefit and protection it was enacted could, therefore, by contract waive the benefit and protection of its provisions.

Caffery *vs.* Ins. Co., 27 Fed., 25.
Desmazes *vs.* Ins. Co., 7 Ins. Law J., 926; s. c., 7 Fed. C., 529; case No. 3821.
Ins. Co. *vs.* Curry, 13 Bush, 812.

The Caffery case above cited is worthy of more than passing consideration. The decision was rendered by Mr. Justice Brown, now of this Court. The principles decided are applicable to the case now before the Court, and so far as counsel are able to discover, have never been contravened, except by the single California case of Griffith, the reasoning of which is opposed to the uniform current of authority.

The statute of Massachusetts passed in 1861, provided, that no policy of insurance hereafter issued by any company chartered by the authority of the Commonwealth shall become void or be forfeited by the non-payment of the premium thereon, etc., "*anything in the policy to the contrary notwithstanding.*" (This clause is also in the Missouri statute construed in the Wall case, and in the Iowa Statute construed in Mutual Benefit *vs.* Robison, 54 Fed. Rep., 580.)

The John Hancock Mutual Life Insurance Company, chartered by the Commonwealth of Massachusetts, issued a policy containing *inter alia* this provision: "It is hereby agreed that every person accepting or acquiring any interest in said policy waives the benefit of Chapter 186 of the Laws of 1861 of the Commonwealth of Massachusetts."

Suit having been brought upon this policy, the plaintiff

insisted that the provisions of the statute could not be waived. Judge BROWN, in discussing this contention, at page 28, says: "We think, however, that a party may waive the benefit of the statute. The words 'anything to the contrary notwithstanding' in our opinion were intended to apply to the ordinary form of policies which provides that there shall be a forfeiture if the premium be not promptly paid; but if the parties choose to adopt any other form of policy which shall be non-forfeitable, we think it within their power to agree that this form shall be substituted for the statutory form, and that the statute may thus be waived by the express agreement of the parties."

The Desmazes case has never been overruled. In the case of Holmes *vs.* Charter Oak, 131 Mass., 64, the point as to waiver was not alluded to in any way.

The Desmazes case above cited was based upon the same statute of Massachusetts and Justice CLIFFORD of the Supreme Court, sitting at Circuit, rendered the decision, holding that the statute being made for the benefit of the insured, could be waived by him, not only expressly but impliedly, by assuming a position inconsistent with an intention to claim its benefit, saying: "Contracts in gen-
"eral will not usually have the effect to modify the
"statute but to this rule there is a large class of excep-
"tions.

"Cases often arise where a party is at liberty to waive
"statutory provisions in his favor, and Mr. Sedgwick lays
"it down as a general rule, that where no principle of public
"policy is violated, parties may waive the provisions of a
"statute which, if fulfilled, would operate in their favor,
"and that proposition is fully sustained by many other
"authorities. * * * When the parties undertake in the
"policy itself to declare the meaning and effect to be given
"to its stipulations, they have a right to do so, except in
"cases where there is some provisions in the statute to in-

"dicate an intention on the part of the legislature to con-
"trol the action of the parties in that respect."

In the case of Insurance Co. *vs.* Curry, above cited, the statute provided that all statements in applications for policies should be deemed representations and not warranties, and that misrepresentations should not, where not material or fraudulent, prevent recovery. The Court held that parties could contract contrary to the statute, "No principle of public policy is involved in a case like this, and where a party chooses by his or her contract to stipulate that parts of it shall have a construction and effect different from that the law would give to it but for their contrary declaration in the contract itself, it ought to be interpreted in the Courts as they have contracted it shall be interpreted."

Where the legislature intends that a provision as to notice shall not be waived by the parties, an express enactment to this effect is usual. Thus in Iowa, by Chapter 210 of the Laws of 1880, it is provided that fire insurance companies shall not declare policies forfeited or suspended for non-payment of notes, unless a thirty-day notice is given, "anything in the policy or application to the contrary notwithstanding."

It is a rule of universal application that statutes made for the benefit of a particular individual, or for a particular class of individuals, and which do not concern the public as a whole, may be waived by the individuals for whose benefit they were enacted.

Mr. Endlich, "Endlich's Interpretation of Statutes," Sec. 444, says: "Another maxim which sanctions the statute related to *assessment companies*, the Court said, "Fixed premiums, payable bi-monthly or otherwise, "are incidents of regular life policies. Assessments are "essential incidents of co-operative associations organized "under this statute, *and notice through some medium is*

"*requisite*. The statute relating to assessment companies "does not undertake to fix the time for a notice, but it "does fix and determine what the notice must contain. "The statute contemplates that through these notices the "policyholders shall be advised of the cause and purpose "of the assessments." An entirely different statute is here presented. The premium was wholly undetermined at the time the contract was made. The premium was "for such an amount as the association may deem re- "quisite for the prompt payment of all loans in the depart- "ment in which this policy is issued, and for the proper "maintenance of the contracts in said department, in- "cluding an amount for expenses as hereinafter provided." The fundamental principle of the contract requires that the policyholder should only pay a certain determinable amount but uncertain till he received his notice, and it was contrary to said principle to require him to pay an *arbitrary* amount if he was not notified.

In the Ficklin case (Fidelity Mutual *vs.* Ficklin, 74 Md., 172), the suit was against a Pennsylvania corporation. The language of the Pennsylvania statute of 1885 did not expressly apply either to domestic or foreign companies, or to companies doing business in Pennsylvania, but simply referred to applications in life policies. The Maryland Court held that "These corporations (*i. e.*, Pennsylvania "corporations) manifestly have not the legal capacity to "make a contract which should give a construction to a "warranty in opposition to that which the law has "established" and that the statute affected the very provisions of the contract itself. It was an express limitation on the subject matter of the contract. In the case at bar the notice is a regulation of something *dehors* the contract.

In the subsequent case of Hermany *vs.* Life Association, 151 Pa. St., 23 (1892), the Court said that the above act effected a change in life insurance contracts, and that

"the evident purposes of this legislation was to strike "down in this class of cases, literal warranties so far as "they may be resorted to for the disreputable purposes "of enforcing actually immaterial matters. It provides a "rule of construction for the purpose of preventing in "justice; and it is as much the duty of Courts to enforce "such rules as it is to administer the statute of frauds "and perjuries." The waiver was held contrary to public policy. To this class of statutes belongs that in Ins. Co. *vs.* Pollard, 26 S. E., 421. The same principles do not apply to the statute at bar. To deprive a person of his insurance moneys because of an actually immaterial matter may be disreputable, it may be unjust, but how can it be said to be disreputable or unjust not to give a man special notice of a fixed amount he has already agreed shall be paid at a specified time to entitle him to a renewal of his contract? There is no such element in the premium notice law.

This Pennsylvania statute belongs in this respect to the same class of statutes as the surrender value statutes which obtain in several States as in Missouri, and which provide in substance that after a certain number of premiums have been paid, the policyholder is entitled to temporary or paid-up insurance, provided he surrenders his policy and demands the benefit of the statute within six months. To absolutely forfeit without any remedy whatever might be said to be unjust, and in the Wall case (Wall *vs.* Equitable, 32 F. R., 277), the Court said: "It is "notorious that many insurance companies were rigorous "in insisting upon forfeitures, sometimes under very in- "equitable circumstances, and there was no little public "clamor by reason thereof. Such clamor prompted many "legislatures to interfere and to seek by legislation to "protect what they supposed the rights of the insured." Again the insurance statute says "anything in the policy "to the contrary notwithstanding," and that there is an

implied prohibition against waiver. In the Clement case it was a surrender value statute which was under consideration. All this is foreign to the New York notice statute. New York State has its surrender value statute, which protects against the injustice referred to.

Yet even the New York surrender value statute expressly allows its provisions to be waived, if waiver is in red ink on the policy, putting that statute on the same footing as we claim the premium notice statute is, namely, non observance of such a statutory provision, is governed by the maxim, *cuilibet licet renuntiare juri pro se introducto*. Every one has a right to waive and to agree to waive the advantage of a law or rule made solely for the benefit and protection of the individual, in his private capacity, and which may be dispensed with without infringing on any public right or public policy.

A strong instance of the legality of a party dispensing with a statutory requirement is the following:

Where a New York Statute required the "written consent" of a wife to the assignment of a policy, it was held that the "written consent" was not always absolutely necessary. Thus in Dannhauser *vs.* Wallenstein, 28 New York Miscellaneous Reports, 690, it was held as follows:

"The requirement, of Chapter 248 of the Laws of 1879, of the 'written consent' of a husband to a wife's assignment of a policy, insuring his life for her benefit may be satisfied, in the absence of a writing, by proof of his acts in the premises.

"Where he induces her, while she is holding a paid-up policy on his life, representing another policy which he has taken out for his own benefit, to assign the paid-up policy for value in order that he may maintain a business life and support the family, she will not be permitted, twenty years later, and after his death, to challenge the validity of her own assignment upon the ground that he had not given a 'written consent' to it."

Mr. Sedgwick (Sedgwick's Construction of Statutory and Constitutional Law, 2d Ed., p. 86) says: "It often becomes an interesting question, how far a statute can be overreached by private compact or stipulation; how far its requisitions may be waived by private consent, expressed or implied. The general rule is that a contract or agreement can modify a law. * * * So it is well settled that not even the most formal or solemn consent can give jurisdiction to a Court not authorized to take it, and whenever an objection is raised, though it may be a breach of faith and good morals to insist upon it, still it will be fatal. To this rule, however, there is a large class of exceptions. * * * These are cases where a party is held at liberty to waive statutory provisions, which, if insisted on, would inure to his benefit, and generally it is true that where no principle of public policy is violated parties are at liberty to forego the protection of the law. * * * It has been said in New York, 'a party may always waive a right in his favor created by statute the same as any other.' * * * The general rule holds good as well in regard to constitutions as to statutes. A party may waive a constitutional as well as a statutory provision made for his benefit. * * *"

Mr. Cooley (Cooley's Constitutional Limitations, 6th Ed., p. 214) says: "Where a constitutional provision is designed for the protection solely of the property rights of a citizen, it is competent for him to waive the protection, and to consent to such action as would be invalid if taken against his will."

The same rule obtains in England. The charter of the Northeastern Railway Company enacted: "Every passenger traveling upon the said railways may take with him his ordinary luggage, not exceeding one hundred and fifty pounds in weight, for first class passengers, and one hundred pounds in weight for second and third class passen-

gers, without any extra charge being made for the carriage thereof." A passenger upon such railway purchased an excursion ticket at reduced rate, on the condition (advertised by placards and handbills) that persons availing themselves of these tickets should carry with them no luggage, and it was held that by purchasing a ticket at this reduced rate the passenger waived the privilege conferred upon him by statute of taking with him his ordinary luggage without extra charge.

Ramsey *vs.* Northeastern R'y Co., 14 C. B. N. S., 640.

In Phyfe *vs.* Eimer, 45 N. Y., 102, Judge RAPALLO, delivering the opinion of the Court, says: "One of full age and acting *sui juris* can waive a statutory, or even a constitutional provision in his own favor, affecting simply his property or alienable rights, and not involving considerations of public policy."

See also Buel *vs.* Trustees, 3 N. Y., 197.

So it has been held that the debtor may waive a statute of limitations made for his benefit.

Weber *vs.* Williams College, 23 Pickering, 302.
Buswell on Lim. and Ad. Poss., Sec. 49.

Also, parties may waive the right declared by statute of assignees of life, fire, &c., insurance policies to sue in their own name.

Insurance Co. *vs.* Lupold, 101 Penn. St., 111.

An adjacent land owner may waive his rights under an act requiring a railroad company to fence.

Ry. Co. *vs.* Decker, 2 Watts, 343.

If the policy was controlled by the terms of the New York statute, can it be doubted that the benefits and privileges conferred by this statute upon the insured were waived by the express terms of the contract?

The general public could have had no concern in a private contract between Mr. Phinney and the plaintiff in error. However favorable or unfavorable the terms of that contract might have been, the public welfare was in no way affected thereby. The parties were *sui juris*. They alone were interested in the kind of a contract to be made. Mr. Phinney had a right to claim the benefit of the protecting provisions of the New York statute, if it be applicable; and he had an equal right to contract for the waiver of the benefit thereof. He did waive them in clear and express terms, showing his intention so to do, and the learned Court below committed reversible error in refusing to so construe the contract as to give effect to the plainly expressed intention of the contracting parties.

The question of waiver of the provisions of this statute have never been adjudged by any decisions except in the Nixon case, above referred to, and the case of Griffith *vs.* New York Life Ins. Co. (101 Cal., 627), cited in the Nixon case, wherein the decision was adverse to the contention of plaintiff in error. This Court, however, is unhampered by any binding adjudication, and we submit for its consideration that the Griffith case is outweighed by the authorities heretofore cited, both in the reasoning by which the conclusions are reached and in the authority of the Courts rendering the same. The same may be said of the case of Warner *vs.* National Life, 100 Mich., 157, construing a different statute. This Court can hardly err in adopting as its own the conclusions reached by such jurists as Justices Brown and Clifford.

Both the Caffery and Desmazes cases are cited by the California Court with apparent approval, but that Court attempts to distinguish between the language of the New York and Massachusetts statutes. It is difficult to conceive any distinction in meaning between the language used in the New York statute, "No life insurance com-

pany * * * shall have power to declare forfeited or lapsed any policy," etc., and that used by the Massachusetts statute, "No policy of life insurance * * * shall be forfeited or become void," etc. (Revised Statutes, Mass., 1892, p. 717, sec. 159). It is, to say the least, hypercritical to draw a distinction between a statute which declares that a company shall not do a certain thing, and one that declares it shall not have power to do that thing. Can it be doubted that both Legislatures had in view the same purpose? It is also noticeable that both statutes use the expression, "anything in the policy to the contrary notwithstanding," which, under the authority of the cases relied upon by plaintiff in error, means nothing more than this, that a forfeiture shall not be had, even though contracted for by the express terms of the policy, and does not in any way refer to mere question of notice and does not inhibit the parties from contracting to waive the statute as to notice.

It will be noted that the facts upon which the Supreme Court decided the case of Ins. Co. *vs.* Clements, *supra* (cited in the Nixon case), that the provisions of the statute of Missouri could not be waived, are entirely lacking from this case. In that case the Circuit Court of the United States sitting in the Western District of Missouri, held that by reason of the public policy of the State of iMssouri, a waiver of the statute of that State relating to the forfeiture of life insurance policies, could not be made, even by the express agreement of the parties. This case was one in which the Federal jurisdiction depended upon the diverse citizenship of the parties. The Federal Court in such a case adjudicates the rights of the parties, precisely as should a tribunal of the State in which it is sitting.

Pritchard *vs.* Norton, 106 U. S., 124 (129).

The public policy of the State of Missouri was, there-

fore, binding upon the Federal Court, which decided the Clements case. No public policy against waiver has ever been declared by the highest Court of New York.

A strict limit is drawn by the Constitution of the State of New York over the power of the Legislature to interfere with the right which a man has to make any contract he chooses which is not forbidden by law. The liberty which is guaranteed by the Constitution is not merely freedom from physical restraint, it is freedom from interference with his right to pursue any honest calling and to make any honest contract. *In re* Jacobs, 98 N. Y., 107; People *ex.* Marx, 99 N. Y., 377. In the absence, then, of fraud, duress or imposition, every man in the State of New York, and we assume also in the State of Washington, is free to agree to waive rights which he enjoys by statute—yes, or even rights which he enjoys under the Constitution. It is his privilege to grant away that right which the Legislature has given him and which the Constitution guarantees him. He may, for instance, waive the right of trial by jury. If it be true that he can waive such a grave constitutional right as that, which is the expression of the ultimate policy of the law, not only of the State, but of the nation, can it be said that he has not the right to waive the service of a notice of the time and place of the payment of an indebtedness? An endorser on a bill of exchange may waive the legal incidents of protest and notice of non-payment, and yet leave all the other incidents of the bill unaffected and its obligation of payment undisturbed; and he may make this stipulation on the bill itself when he endorses it. So the maker of a promissory note may, in the very contract itself, waive demand for payment. There is nothing better established in the law than that the endorser of a bill or note is liable to pay it if it is not paid by the party primarily liable; and yet the liability may be waived by the acceptance of

such an instrument with the words, "without recourse" written over the endorsement. So the benefit of exemption and stay laws may be waived.

Daniel on Negotiable Instruments, Sec. 61.

This rule of the right to contract is universal, excepting only where it is the policy of the law that certain liabilities to the public at large by one who is engaged in a public business shall not be waived by contaret. Thus a common carrier or an innkeeper shall not contract against the liability for his own negligence; and yet even this doctrine is yielding to modern influence.

Sir George Jessel says in Printing Co. *vs.* Sampson, 19 Eq. Cas. L. R., 462. "There is one thing," said that eminent Master of the Rolls, "which more than any other public policy requires, and that is that men of full age and competent understanding shall have the utmost liberty of contracting, and that contracts when entered into freely and voluntarily shall be held good and shall be enforced by courts of justice."

If the parties had the power to contract that the laws of New York should govern this contract, they certainly had the power to declare at the same time how far said contract should be subject to said laws, and to waive any particular law of New York, or any portion of any statute of that State.

(4.) *None of the decided cases holding that this statute cannot be expressly waived are either well considered or binding upon this Court.*

In the Nixon case, 81 F. R., 802, *there was no contract of waiver in the policy.* The waiver relied on was one after the premium became due. The Court said "that "the statute of New York prescribed the condition upon "which a policy may be forfeited for the non-payment of "a premium. The statute is mandatory and controls the

"contract. Its provisions are not subject to be set aside "or waived either by the company, or the assured, or "by both together," and refers to the *Clements* case, the *Hicks* case, the *Griffith* case, and the *Warner* case. This statement of the law is simply dogmatic. No reason of any kind is assigned. The statute is simply declared mandatory. The *Trimble* case (83 F. R., 85) in the same circuit simply followed the Nixon case.

The Clements case was not upon this statute.

The Rosenplaenter case (96 F. R. 721), had no question in it of waiver of any statute or stipulation to waive a statute.

In the Hicks case (60 F. R., 690) also there was *no agreement of waiver in the* policy, and no claim that *sending of notice* had been waived. The claim by the plaintiff was that there had been such a course of dealing that the assured was authorized to suppose that payment of the premiums within a reasonable time after the day of payment would be satisfactory to the defendant. The case is no authority that the statute cannot be expressly waived.

In the Griffith case (101 Cal., 627) there was an express agreement to waive. The Court held that the notice was a matter of public policy, because of the phrase in the statute "No * company * * shall have power." The statute does not say that the notice shall not be waived. Suppose the statute had read "No * * company * * shall have power, etc., * * unless sending notice expressly waived." There would have been nothing inconsistent in this. The Court obviously lays an undue stress on the word "power," which has no special significance, and as has been shown elsewhere, has been eliminated from later statutes. The Court adds: "The reasons for such a policy are so numerous and ob- "vious, that it is not deemed necessary to occupy time

"and space in specifying them." No Court has ever stated any "numerous and obvious reasons," for there are none. The propriety of a waiver is abundantly shown elsewhere in this point.

In the case of Ins. Co. *vs.* Smith, 41 S. W., 680, there was no *discussion* of the question of waiver.

The Warner case, 100 Michigan, 157, was not a case construing the New York Statute in question, but another statute in the State of New York relating to Assessment Companies. The policy provided that notice should be sent that the premium was payable and that any other notice was expressly waived. It further provides that in the event of the holder not receiving a notice he should pay an amount equal to the last premium paid.

The statute requires that each notice shall truly state *the cause and purpose of the assessment.* The Court held that these statutory provisions could not be waived by the parties and that the statute contemplates that through the notice the policyholder should be advised *of the cause and purpose of the assessment.* The statute could not be voided by a condition annexed to the policy, but in case no notice was given the insured should forward to the association an amount equal to the previous assessment, spoken of in the statute as "the scope," but this statute is entirely different from the one at bar.

The following cases are cited to show the great variety of instances in which the doctrine of waiver is applied in both State and Federal Courts, all bearing directly upon the present case.

Wright *vs.* United States (1883), 108 U. S., 281.

Section 3264 of the Revised Statutes provides for a survey of the distillery by the collector, and a written report thereof in triplicate, "of which one copy shall be deliv-

ered to the distiller, one copy shall be retained by the collector, and one copy shall be transmitted to the commissioner of internal revenue, and the survey shall take effect upon the delivery of such copy to the distiller."

Said the Court (WAITE, C. J.): In holding that the distillers had waived notice by endorsing on the report of the survey and signing "We hereby accept the within survey and consider the same as binding upon us on and after this date" with date attached, "the Court below decided that this endorsement was in law a waiver of a delivery of a copy of the report to the distillers, and that the tax was consequently collectible. To this we agree. The language of the act is that 'the survey shall take effect upon the delivery of said copy to the distiller.' This is equivalent to saying that the survey shall be binding on the distiller when the copy is delivered to him. When, therefore, the distiller, in this case, accepted the survey and stipulated that it was binding on him, he, in effect, said that he would consider the survey as having effect without the formal delivery of a copy. *This he might do.*

Schutte *vs.* Thompson (1872), 15 Wall., 151.

"Although the formalities prescribed by the thirtieth section of the Act of Congress of September 2d, 1879, authorizing the taking of depositions *de bene esse* in certain cases and stating the circumstances under which and the words in which they may be taken, must be strictly observed (the act itself being in derogation of the common law), yet a party may waive any provisions intended for his benefit." Said the Court: "A party may waive any provision, *either of a contract or of a statute intended for his benefit*."

Ins Co. *vs.* Norton (1877), 96 U. S., at page 240.

Mr. Justice Bradley in the following case says:

"*A party always has the option to waive a condition or stipulation made in his own favor.* Rule applied in holding that an insurance com-

pany had, by accepting premiums after they fell due, waived its right to insist upon a forfeiture for non-payment of premiums which were tendered when insured was *in extremis*."

Henderson's Distilled Spirits (1871), 14 Wall., 44.

Mr. Justice Clifford in the following case says: "Being a seizure on land, the claimant was entitled to a trial by jury, but he appeared and the parties entered into a stipulation waiving a jury and submitted the case to the Court upon an agreed statement of facts *as they had a right to do, even before any legislative provision was enacted for waiving a jury by a written stipulation.*"

Woods *vs.* The Board of Supervisors of Madison County, 136 N. Y., 493 (1893).

"The defendant has capacity to sue and be sued, to audit, settle, pay or compromise claims against it, and this fairly implies power to agree upon terms of payment *and to waive by proper agreement the defence of the Statute of Limitations as to claims not barred.*"

State *vs.* Benton, 48 New Hampshire, 551 (1869).

In holding that the only surety in a criminal recognizance was bound, although the statute required two sureties, the Court said:

"The law requiring two sureties was not enacted for the benefit of the respondents or sureties, but for the security of the state. * * * Individuals in many instances, are allowed to waive statute requirements enacted for their own benefit and it seems reasonable in a case like the present that the state should have the same privilege."

Tasker *vs.* The Kenton Ins. Co., 58 N. H., 469 (1878).

In a California case the policy contained following clause:

"It is furthermore hereby expressly provided and mutually agreed, that no suit or action against the company for the recovery of any claim by virtue of this policy, shall be sustainable in any Court of law or chancery unless such suit or action shall be commenced within twelve months next after the loss shall occur.

The action was not commenced within the twelve months succeeding the loss. The clause, said the Court, "is in form and effect a condition precedent and unless it is complied with, there can be no recovery at common law. It is said that the action may be maintained under the provisions of Gen. St. C. 157, S. S., 6, 7. * * * But the parties to the policy did not intend that the statute should govern or control it, as they have expressly agreed that the clause in the policy shall be operative, any statute of limitation to the contrary notwithstanding. *Statutes that are made for the benefit of particular persons may be waived by them.* Sections 6 and 7 were evidently enacted for the benefit of those insured, but the plaintiff has waived their benefits in terms as absolute as language can express."

Ellis *vs.* Mass. L. Ins. Co. (Cal.), 45 Pac., 988 (1896).

A life policy provided that no claim should exist under it unless notice and proof of death were given within two years from death of insured. A statute fixed a shorter period, namely, ninety days within which such notice should be given. In holding that the policy provision was a waiver of the statutory benefit, the Court said:

"This requirement in reference to the time of notice and proof of death is imperative and binding upon the insured and his beneficiaries. But this is a provision incorporated in the law for the benefit of the insurer. A provision in a law or in a contract intended for the benefit of a party may be waived by the party to be benefitted thereby."

See also:

Warren *vs.* Walker (23 Maine, 453), holding defendant *estopped* from setting up statute of limitations by reason of waiver, although memo. containing waiver, was not sufficient as an express promise and in writing to take the case out of the statue.

Lyman *vs.* Littleton, 50 N. H., 42, holding that a town may waive notice of a pauper claim required by statute on the ground that the statute "may be waived by the party for whose benefit the statute provides."

Hanover *vs.* Weare (2 N. H., 131), holding that, in an action for a claim against the town, a statute could be effectually waived which provides that "no such action

shall be sustained against any town or person for any sums expended as aforesaid, unless such notice has been given in the manner aforesaid," on the ground that a statute can be waived and a party will be estopped from setting up a statute which waived one intended for his benefit.

Sleeper *vs.* Ins. Co. (56 N. H., 401), overruling Chamberlain *vs.* Ins. Co. (55 N. H., 249), which, notwithstanding, was cited as an authority, *a controlling authority*, in cases relied upon by defendant in error, notably White *vs.* Con. Mutual L. Ins. Co., 4 Dill., 177, and holding that a statute does not control an express stipulation in a fire policy.

Beers *vs.* State of Arkansas, 20 How., 529, holding that a State may waive its privilege by authorizing by its constitution suits to be instituted against its own Courts.

Bomberger *vs.* Terry, 103 U. S., 40, holding that a jury may be waived by implication.

Howard *vs.* Stilwell (139 U. S., 199), holding that party may waive right to object to interrogatories.

In the matter of N. Y. L. & W. Ry. Co., 98 N. Y., 447, in holding that a contract appointing a commissioner to determine the value of property appropriated by the company, and regulating the proceedings, was binding upon the party, said EARL, J., of the New York Court of Appeals :

> "Parties by their stipulations may in many ways make the law for any legal proceedings to which they are parties, which not only binds them, but which the Courts are bound to enforce. They may stipulate away statutory and even constitutional rights. They may stipulate for shorter limitations of time for bringing actions for the breach of contracts than are prescribed by the statutes, such limitations being frequently found in insurance policies. They may stipulate that the decision of the Court shall be final, and thus waive the right to appeal; and all such stipulations not unreasonable, not against good morals, or sound public policy, have been and will be enforced ; and generally, all stipulations made by parties for the government of their conduct or the control of their rights in the trial of a cause, or the conduct of a litigation, are enforced by the Courts."

In the case before us there was an express waiver of the rights to this notice. The act was passed, as the Court of Appeals declares, from the purpose of preserving to the assured the benefit of the premiums which he had paid and saving them from forfeiture. The object of the act, therefore, was for the benefit of the assured ; and there is no statute of New York or Washington which prevents him from entering into a contract that he dispenses with that notice. He has done so in this case by accepting the policy containing that provision.

As heretofore stated, it is contended by defendant in error that the statute of New York, above quoted, applies to and governs this policy by reason of the express agreement of the parties to that effect. To sustain this contention reliance is placed upon that clause in the application which states: "This application is made to The Mutual Life Insurance Company of New York subject to the charter of the company and the laws of the State of New York."

This contention of defendant in error furnishes additional ground for holding that the position taken herein as to the waiver of the provisions of this paragraph, is correct. If this contract is governed by the statute of New York, because the parties have stipulated that it shall be so governed, and by the same contract the parties have limited the application of said statute, and have agreed that no notice of non-payment shall be necessary, then, surely, if effect is given to their contract for the purpose of subjecting this policy to the control of the New York statute at all, effect must also be given.

B.

ACTUAL KNOWLEDGE POSSESSED AND ACTED UPON BY THE INSURED OBVIATED THE NECESSITY FOR STATUTORY NOTICE.

It was established as a fact by the undisputed evidence in this case that prior to the maturity of the premium for 1891, the company sent a notice to the assured stating when the same would be due and payable, that this notice was received by him, and that in response thereto he came to the representative of the company and endeavored to make terms for the payment of the premium other than those contained in the policy, by offering to give time notes for the payment of the amount of the premium. The plaintiff in error never agreed for the purposes of the case that no notice was sent. The matter appearing on page 190 of the Record applied only to the witnesses in question and not to Stevenson's testimony. The statement there made only referred to notice in *statutory form*. No evidence of such matter appearing on page 190 of the Record was given on the trial as appears by all the evidence set forth. Evidence as to other notice and knowledge was received without objection and cross examined upon. Evidence being before the jury without objection plaintiff in error was entitled to proper instructions upon it. Defendant in error's contention as to this is an after thought on appeal. The plaintiff in error duly requested the Court to give the instructions set out in paragraphs XV and XVI, Specification of Errors, which instruction the Court refused to give, to which refusal exception was duly taken and error assigned thereon.

We submit that any notice given, recognized and acted upon by the assured as notice, constitutes a substantial and effective compliance with the statute, and although

the notice given may not have been in the form required, nor at the time prescribed by the statute of New York, yet, if Mr. Phinney did not object to its sufficiency as notice at the time, but on the contrary accepted the same as a proper notice, neither he nor his representative can now be heard to say that said notice was insufficient as a compliance with said statute.

Johnson *vs.* Oppenheim, 55 N. Y., 280, 291.
Bryant *vs.* Goodnow, 5 Pickering (Mass.), 228.

Referring to a statute which provided that in warranties contained in applications for policies, no misrepresentation or untrue statement, made in good faith by the applicant should affect a forfeiture or be a ground of defense "unless such misrepresentation or untrue statement relate to some matter material to the risk," said Judge STERRETT, "The evident purpose of the legislature was to strike down, in this class of cases, literal warranties, so far as they may be resorted to for the disreputable purpose of enforcing actual immaterial matters. It provides a rule of construction for the purpose of preventing injustice; and it is as much the duty of Courts to enforce such rules as it is to administer the statute of frauds and perjuries. It would be contrary to public policy to recognize the right of parties to circumvent the law by setting up a waiver, such as was insisted on in this case. The Court was therefore right in holding that the waiver was invalid."

Hermany *vs.* Life Assn., 150 Pa. St., p. 24.
Farlow *vs.* Ellis, 15 Gray (Mass.) 231.
Weymouth *vs.* Gorham, 22 Maine, 385.
York *vs.* Penobscott, 2 Greenleaf (Me.) 1.

In Johnson *vs.* Oppenheim, this principle is thus stated: "When some formal act or acts are to be performed by a

" party as a condition precedent to some right, or to per-
" fect a right of action or property, and the act as per-
" formed is defective or imperfect, and the adverse party
" whose right it is to object and insist upon a more perfect
" compliance with the condition, makes no objection to the
" manner of its performance, but accepting the perform-
" ance as perfect, places his objection to the claim and right
" asserted upon another distinct and independent ground,
" he is held to have waived all objection to the formal or
" technical defects. The rule rests upon the ground that
" the party by his silence has misled his adversary, and
" not having spoken when he ought, shall not be permitted
" to speak when he would. The principle has its most fre-
" quent application in actions upon policies of insurance,
" where there have been some defects in the preliminary
" proof of loss of interest, which have not been objected
" to, but the claim has been resisted on other grounds."

The parties to a policy of insurance by law stand upon the same footing, and the same principles of law apply to the insured as to the insurer; and if the insurer may waive rights by receiving, accepting and acting upon notices, proofs of loss, etc., defective in form and insufficient in point of time, can the insured likewise bind himself and his representative by the same conduct with reference to notice required, either by the law or his contract? Certainly, it is not the law that the rights of the different parties to the same contract are to be measured by dissimilar rules and standards. The same rule should work both ways.

The case of Bryant *vs.* Goodnow seems specially applicable to the case at bar. It was an action upon a subscription to establish a stage line. The subscription provided that when the shares had been taken up there should be a meeting of the subscribers for the purpose of making ar-

rangements to carry on the proposed business. The defendant resisted payment of his subscription on the ground that he had not been notified of the first meeting of the subscribers; but it seems that he, subsequent to this meeting, offered to pay his subscription if the plaintiff would *receive oats in payment.* By parity of reasoning it would seem that Mr. Phinney waived any objection to the form of notice when he offered to pay his premium, provided the company would *receive notes in payment.*

Says Chief Justice Shaw, Farlow *vs.* Ellis:

> "Waiver is a voluntary relinquishment or renunciation of some right, "a foregoing or giving up of some benefit or advantage, which, but for "such waiver he would have enjoyed. It may be proved by express "declaration, or by acts and declarations manifesting an intent and "purpose not to claim the supposed advantage; or by a course of acts "and conduct, or by so neglecting and failing to act as to induce a be-"lief that it was his intention and purpose to waive * * * "The question of waiver, therefore, is a question of fact for a jury; "it may be proved by various species of proofs and evidence, by dec-"larations, by acts, and by nonfeasance or forbearing to claim or act: "but, however proved, the question is: has he willingly given up and "forborne to claim the benefit of the conditions?"

It is specially significant that the Maine cases above cited are both cases wherein a *notice required by statute* to be in a particular form was informal; and the party receiving the same having made no objection to the form of the notice at the time of its receipt, and having acted thereon, it was held that the statute was substantially complied with, and that the notice was sufficient.

(a.) *Specifications of Errors XV and XVI are based on instructions in accordance with the evidence.*

(1.) Phinney, before the maturity of the premium, came to the representative of the company and requested further time in which to pay the premiums.

The testimony is (Rec., pp. 260, 265, 266) that Phinney asked to give notes payable in sixty days.

(2.) Such extension of time was refused.

The testimony is (Rec., p. 260, 265, 266) that the agent declined this proposition.

(3.) Phinney, however, recognized the fact to be that his policy would be forfeited unless the premium was paid.

Phinney was sent a notice (Rec., p. 259). He responded to that notice to pay his premium on or before the due date (Rec., p. 260).

The policy itself provided, "This policy shall become void by non-payment of premiums" (Rec., p. 4).

(4.) Phinney thereupon stated that he was unable to pay said premium.

Phinney offered notes payable in sixty and ninety days (Rec., p. 260).

This was not paying the premium, and he offered nothing else.

(b.) *The plaintiff in error however contended that actual knowledge by the insured of the due date of the premiums and actual dealings respecting the payment of the premium is equivalent to serving the statutory notice if required at all in this case.*

The defendant in error cites some cases in New York to show that the statutory form of notice must be followed. None of the cases touch the facts in this case, or what is the effect of receipt of actual notice and an actual response thereto, such as was made in this case.

The Court in the Phelan case expressly held simply that the irregular notice *was never received.*

In the Carter case the *notice was sent to another person.*

POINT VI.

The defendant in error is estopped from asserting any claim under the policy in suit, for the reason that her testator had abandoned and surrendered the Policy as an existing contract long before his death.

Three propositions are here presented:

(1.) That the testator had a right to abandon and surrender the policy.

(2.) That he exercised that right.

(3.) That his executrix is estopped to invoke the provisions of the statute of New York respecting notice.

(1.)

THE TESTATOR HAD A RIGHT TO ABANDON AND SURRENDER THE POLICY.

This proposition requires no argument to support it. "The very nature of this class of contracts," says Mr. Joyce, referring to life policies depending upon the payment of premiums at specified times, "implies a right of the assured to annul the same" (Joyce on Insurance, Vol. II, p. 1636; and see authorities cited in the discussion of the third proposition, *infra*).

This might not apply to cases where one has

insured his life for another's benefit, for, as was said in Griffith *vs.* Life Ins. Co. (101 Cal., at page 638) "the doctrine is well settled that where a valid policy is regularly delivered in pursuance of a consummated contract to one who has procured insurance upon his own life, *payable to another*, the insured cannot surrender the policy without the consent of the beneficiary." But if the beneficiary is the insured himself, as in the present case, his right to surrender does not depend on the consent of anyone else. Whoever is the beneficiary, whether the insured or some third person, to him belongs the policy the moment it is issued, and if insured and beneficiary are combined in the same person that such person has absolute control, is an elementary proposition.

(2.)

THE ASSURED EXERCISED HIS RIGHT TO ABANDON AND RESCIND THE CONTRACT.

This is established by the positive testimony of F. L. Stinson, the company's agent, which remains uncontradicted, and not only so, but is corroborated by facts and circumstances which are not in dispute and which can be explained upon no other theory than that the company was in possession, as of right, of the policy in dispute.

From the testimony of Mr. Stinson, who was at the time the general agent of the company for the State of Washington, it appears (Printed Record, pp. 254–301) that, prior to the 24th day of September, 1891, the day when the second year's premium fell due, the assured, having received notice that it was about to become due, called upon the agent at Seattle and endeavored to induce him to accept notes in payment of the premium instead of cash as required by the policy. This, the agent, as in duty bound, refused to do, and the assured, being unable to pay the

premium, suffered default. In December or January following "I was in Mr. Phinney's office," says the witness (p. 262), "and we got talking about insurance and the subject of his policy came up, and I requested him to let me have the policy to use for canvassing purposes and he stated the same having lapsed he had no further use for it and I could take it if I wanted it." The agent thereupon took the policy and retained it. Here was a recognition on the part of the agent that the policy was no longer in force as indicated in his request to take it away with him which he would not have preferred had he regarded the policy as a valuable instrument, evidence of a subsisting contract; and a similar recognition on the part of the testator in express language. These facts, as has been said, are not contradicted.

Moreover, it appears that during the period of nearly two years from the time of his delivering the policy to the agent until his death in September, 1893 (p. 9), no effort or attempt was made on the part of Mr. Phinney to regain possession of the policy. At the time of his death it was not amongst his papers or other policies; his executrix could not produce it at the trial; it had never been in her possession (p. 235); she does not include it as an asset belonging to her husband's estate in her sworn statement on applying for letters testamentary, placing the value of the total personal assets at $50,000, instead of $150,000, as they would have amounted to had the policy been included, and regarded as still subsisting, it would have been included, *for it purports to be payable to the assured's estate* (Plffs. Ex. "A." pp. 212-215 Printed Record); in fact, she never knew of the existence of any such policy until ten months after the death of her husband, as she admits in a letter to the company. "I was not aware," she writes, "that he held such a policy until a few days ago, when the matter was brought to my atten-

tion" (Pltffs. Ex. "C," pp. 227 228 P. R.). From the time of the surrender in December, 1891, until July, 1894, no overture or communication whatever was made by Mr. Phinney, or by any one on his behalf, to the company or its agent for a return of the policy or by his executrix or other person on her behalf, to have the policy paid or recognized as a valid subsisting contract; not to Mr. Stinson up to the time when he was succeeded by Mr. Pond as the company's general agent (p. 263), nor to Mr. Pond until July, 1894, or ten months after the testator's death (p. 9), not although the other assets, including life insurance, had been collected long before.

These are the facts upon which plaintiff in error claims that by agreement between the parties—between the insured on the one hand, in the exercise of his right to surrender, and the company on the other, in the exercise of its right to accept—the policy was rescinded and abandoned *so far as the actual intention of the parties could be carried out.*

"The most solemn contract under seal, when the statute of frauds is not involved, may be changed or abrogated by a new parol agreement, express or implied, and a contract within the statute may be taken out of it by the conduct of the parties."

Railroad Co. *vs.* Trimble, 10 Wall., 267, 363.

"After the agreement had been reduced to writing it is competent to the parties, in cases falling within the general rules of the common law, at any time before the breach of it by a new contract, *not in writing*, either altogether to waive, dissolve or annul the former agreement, or in any manner to add to or subtract from, or vary or qualify the terms of it, and thus make a new contract" (Language of Lord Denman, quoted in Emerson *vs.* Slater, 22 How. Rep., 28-41).

We have just said that the policy was rescinded and abandoned so far as the actual intention of the parties could be carried out. But, on the part of the defendant in error, it is contended, that the intention of the parties could not be carried out by reason of the statute requiring notice. Usually where a notice is required by statute actual knowledge will dispense with it, and notice can be waived. Hanover *vs.* Ware, 2 N. H., 131; Embden *vs.* Augusta, 12 Mass., 307; Lyman *vs.* Littleton, 50 N. H., 42; *in re* Cooper, 93 N. Y., 507; Sharpley *vs.* Abbott, 42 N. Y., 443; Lee *vs.* Tillotson, 24 Wend., 337; Embry *vs.* Conn., 3 N. Y., 511; *in re* D., L. & W. R. R., 99 N. Y., 477.

To an ordinary mind, to serve notice upon a person who is already present for the purpose of engaging in the transaction as to which notice is required to be given, is a useless, purposeless, vain proceeding. Nevertheless, it is contended by counsel for the defendant in error, that the statute requires it.

Suppose it be conceded for argument's sake that if the assured has not been served with the statutory notice he will not suffer a forfeiture, notwithstanding that he has actual knowledge of the premium's maturity—this has no application to a case where *he has entered into a new and binding obligation inconsistent with the continuance of the original contract of insurance, and which would warrant and entitle the insurer to treat the contract as at an end and withhold notice.* This is exactly what was done.

The right of the assured to abandon the contract, no statute could deprive him of. The statute did not restrain him from contracting with the company with reference to the policy for all time and in respect of all matters. Notice! There was no question of notice discussed or considered leading to the surrender, there was no question

of waiver of notice. The parties met before the time for payment had expired and by mutual agreement evidenced by the positive testimony of Stimson and by the subsequent events set forth above, the contract was abandoned and surrendered. Suppose the agent, with authority from the plaintiff in error, had complied with the assured's request by accepting notes instead of cash, upon the stipulation that if the notes were not paid at maturity the policy would lapse. In such a case, if the notes were not paid at maturity, would the assured still have the right to insist that the statute had not been conformed to? Certainly not upon any principles of common sense or justice. And yet the taking of the notes would not affect the position of the plaintiff in error, resting, as it does, upon the express agreement, which in the supposed case provided for an extension and in the actual case for a present abandonment and surrender.

This question of agreement, abandonment and surrender was not submitted to the jury in proper form according to the evidence.

The portion of the charge in which reference was made to the agreement contained an intimation that the jury might consider whether it was induced by false representtions or deceit. We quote the charge as contained in the 20th exception.

> "If the evidence in this case shows that Mr. Phinney did voluntarily, *without being induced by false representations or deceit*, rescind the contract and give up the policy, rather than to continue to pay the premiums provided for in the policy, that agreement would have the effect to terminate this policy, so that it would no longer be a continuing contract."

Now, there is not a word of evidence that any fraud was practised by the company or its representative upon Mr. Phinney. The defendant in error tries to distort an answer of the witness Stimson into evidence of fraud. Her counsel asks (p. 182):

"Q. You told him it was forfeited and it was not any good to him, or words to that effect?

A. Words to that effect; yes, sir."

If this was a deception it was not willful as appears from the following:

"Q. And you were well acquainted with Phinney?

A. Yes, sir.

Q. And a good friend of yours?

A. Yes, sir.

Q. Now, you didn't mean to tell him an untruth?

A. No, sir

So that, at all events, the agent did not intend to defraud his good friend.

Moreover, it does not appear that what the witness said with reference to forfeiture had anything to do with Mr. Phinney's abandonment of the contract of insurance. On the contrary, that purpose was carried out before the premium fell due, whereas the witness expressed his views as to forfeiture in December or January following (p. 180), at the time, it is true, when the policy was actually delivered over to the witness, but that delivery was not the consummation of the agreement, but evidentiary of it, merely, along with other subsequent circumstances; it occurred very casually. As the witness says, "It came up in a general conversation" (p. 181), whether after or before, Mr. Phinney said "he had no further use for it" (p. 180), does not appear.

Counsel for defendant in error argues that the fraud and deception consists in the representation by the agent that the default of the insured worked a forfeiture in as much as it was a misrepresentation of foreign law and therefore a misrepresentation of fact.

That a foreign law is to be proved as a fact is a proposition not to be disputed. But that is another and quite a different thing from the construction of a foreign statute.

In the case of Cathcart *vs.* Robinson (5 Peters, 263), it is said, to quote from the syllabus:

> "The construction which British statutes had received in England at the time of their adoption in this country, indeed to the time of the separation of this country from the British Empire, may very properly be considered as accompanying the statutes themselves, and forming an integral part of them. But, however, subsequent decisions may be respected, and certainly they are entitled to great respect, their absolute authority is not admitted. If the English Courts vary their construction of a statute which is common to both countries, we do not hold ourselves bound to fluctuate with them."

And in Kline *vs.* Baker, 99 Mass., at page 255, Mr. Justice GRAY says:

> "And when the evidence admitted consists entirely of a written document, statute or judicial opinion, the question of its construction and effect is for the Court alone," citing numerous cases

But we deny that it was a misrepresentation of either fact or law. Whether the statute of New York applied to work a forfeiture was merely a matter of opinion. That it did not apply in this case was the opinion of Mr. Phinney as well as Mr. Stinson; it was the opinion of the company at the time of the abandonement; it is most assuredly the opinion of the company's counsel to-day and, as we hope and believe, it will be found to be the opinion of this Honorable Court.

But the case of Surin *vs.* Baker, recently decided in this Court (150 U. S., 312), settles this point. It was sought to cast upon the complainant responsibility for the loss of goods consigned to him upon the ground that in certain suits upon the insurance policies he had testified that he was the owner. In holding him not responsible, said the Court:

> "Both the defendants and the insurance companies had the written contracts before them, and were presumed, as a matter of law, to know their legal effect and operation. What the complaint said in his tes-

timony was a statement of opinion upon a question of law, where the facts were equally well known to both parties. Such statements of opinion do not operate as an estoppel. *If he had said, in express terms, that by that contract he was responsible for the loss, it would have been, under the circumstances, only the expression of an opinion as to the law of the contract, and not a declaration of admission of fact,* such as would estop him from subsequently taking a different position as to the true interpretation of the written instrument."

See also Latham *vs.* Smith, 40 Ill., 25.

We submit, therefore, that the learned trial Judge erred when he instructed the jury to take into consideration the question whether the agreement was induced by fraud, of which not a particle of evidence existed. (See 29th Exception, p. 344, and 30th Assignment of Error, p. 387.)

The exception to the learned Judge's refusal to charge as requested by counsel for the plaintiff in error:

"*Upon all the evidence in this case you are instructed to find a verdict in favor of the defendant*" (27th Exception, 28th Assignment of Error), *was well taken.*

If the agreement of rescission had been established in the opinion of the jury and they had rendered a verdict in favor of the plaintiff in error, what item of testimony in the whole record would avail the defendant in error to disturb such a verdict? As we have taken pains to point out, no effort was made to controvert the testimony adduced to prove the rescission and abandonment. The facts and circumstances were all conceded or left uncontradicted. Nevertheless the Court left it to the jury as a question of fact by them to be determined. We quote from his charge the portion included in the 30th Exception and 31st Assignment of Error:

"It is a question of fact, therefore, for you to determine from the evidence in the case whether there was a full, complete understanding and meeting of minds between Mr. Phinney and Mr. Stinson, and such an agreement and understanding entered into between them, whether the policy was surrendered and delivered up to Mr. Stinson with that

understanding and whether, relying upon that understanding, the defendant subsequently acted."

This was undoubtedly erroneous. The plaintiff in error having made out a *prima facie* case establishing the rescission, which remained uncontradicted, was entitled to a verdict by direction. In the case of Kelly *vs.* Jackson (6 Peters, 622), the law is thus stated :

"*Prima facie* evidence of a fact is such evidence as in judgment of law is sufficient to establish the fact ; and if not rebutted, remains sufficient for the purpose. The jury are bound to consider it in that light, unless they are invested with authority to disregard the rules of evidence, by which the liberty and estate of every citizen are guarded and supported. No Judge would hesitate to set aside their verdict and grant a new trial if, under such circumstances, without any rebutting evidence, they disregard it. It would be error on their part, which would require the remedial interposition of the Court. In a legal sense, then, such *prima facie* evidence, in the absence of all controlling evidence, or discrediting circumstances, becomes conclusive of the fact; that is, it should operate upon the minds of the jury as decisive to found their verdict as to the fact. Such are understood to be the clear principles of law on this subject."

Again :

Lilienthal's Tobacco *vs.* United States, 97 U. S., 268.

"High authority supports the proposition that when a presumption of fact exists against a party in a case of seizure *in rem*, the Court may instruct the jury that the burden is on such party to remove the presumption, and that if it does not, the case must, in an issue in a civil case, go against him on such point.

Whenever evidence is offered to the jury which is in its nature *prima facie* or presumptive proof, its character as such ought not to be disregarded ; and no Court has a right to direct a jury to disregard it, or to view it under any different aspect from that in which it is actually presented."

Dwight *et al. vs.* Germania Life Ins. Co., 103 N. Y., 343.

"If the proof of a fact is so preponderating that a verdict against it would be set aside by the Court as contrary to the evidence, it is the duty of the Court to direct a verdict. It is not sufficient to authorize a submission of the fact to the jury that there is a 'scintilla of evidence' a mere surmise to the contrary."

Kelly *vs.* Burroughs, 102 N. Y., 95.

> "The mere fact that the plaintiff, who testified to important particulars, was interested was unimportant in view of the fact that there was no conflict in the evidence, or anything or circumstance from which an inference against the fact testified to by him could be drawn."

There is no dispute as to the company's *prima facie* case. This is conceded by the Judge who tried the case, or he could not have given it to the jury, for it was the only question of fact which he recognized. *All other questions were disposed of as questions of law.*

3.

THE DEFENDANT IN ERROR IS ESTOPPED TO INVOKE THE PROTECTION OF THE STATUTE.

We contend, therefore, that there was an actual agreement of recission which the Court should have taken cognizance of as being established by uncontradicted evidence and we content that the defendant in error is estopped by that agreement as well as by the acts and conduct of the assured.

The plaintiff in error shows affirmatively that the recission of the contract was the result of the express agreement into which the question of notice never entered. This position is not controverted. The defendant in error does not oppose it. She does not say that failure to pay the premium was in any sense referable to the absence of notice, but invokes the statute on general principles. Her position, however, is entirely untenable according to a decision of the New York Supreme Court in which a policyholder sought to excuse his failure to pay his premium on the ground that the company allowed itself to become insolvent. In denying his claim said the Court :

> "There is nothing in the case to show that the failure to meet the premium was because of the insolvency of the company. If the claimant wishes to be excused from the consequences of his omission

> to perform his part of the contract he must, at least, show his readiness and willingness to perform, and that he refused performance upon the ground that the other party had broken the contract by allowing itself to become insolvent. *There is nothing to contradict the inference to be drawn from the failure to pay the premiums, that the claimant intended to abandon the insurance. Having failed to pay apparently because he saw fit to terminate the contract he is in no position to take a ground not then thought of and assert a demand long since abandoned.*"

In re Attorney-General *vs.* The Continental Life Ins. Co., 64 How. Pr., N. Y., 520.

This case was cited and the language underlined quoted in part and approved by BRADY, P. J., in delivering the opinion of the General Term of the New York Supreme Court in the case of The People of the State of New York *vs.* The Globe Mutual Life Ins. Co., (32 Hun., 147), which case was affirmed on appeal to the New York Court of Appeals upon the General Term opinion (96 N. Y., 666).

The very same principle is recognized by this Court in the case of Railroad Company *vs.* McCarthy (96 U. S., 258, 267), cited and approved in a more recent case, Davis *vs.* Wakelee (156 U. S. 690), to quote from the latter case :

> " Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after the litigation was begun, change his ground, and put his conduct upon another and different consideration. *He is not permitted thus to mend his hold* "

Keeping in view the fact that the insured had a sovereign right to abandon the contract of insurance, of which right no statute could deprive him ; that he came to the company's agent and told him that he couldn't pay the maturing premium ; that he didn't pay it when it matured ; that he didn't place his omission to pay upon the ground that no notice was sent, but upon the ground that he hadn't the cash ; that, indeed, no question of absence or waiver of notice or of notice at all arose to influence

him one way or another ; in view of these facts, was not the agent fully warranted and justified in treating the contract as abandoned by the insured in the exercise of his right and privilege? If the idea of serving the statutory notice ever entered his head, which under the circumstances, is not at all likely, he would naturally and logically have abandoned it on the theory that the statutory requirement applied only to existing contracts, whereas, his was a case in which the contract was rescinded by the voluntary act of the other party to it, and he would have been sustained in what he did by a plentitude of authorities.

"It would not, we apprehend, be insisted, that if the parties, by mutual agreement, had rescinded the contract, a recovery could be had ; and we are not able to perceive any difference, so far as the rights of the parties are concerned, between a recission proper and the termination of the contract in the way mentioned. In either case, the defense to an action brought upon the contract would be full."

Drake *vs.* Goree, 22 Ala., 415.

"A positive and absolute refusal by one of the parties to perform a contract for a purchase and sale of land gives to the other party, as an alternative remedy, the right to assent to such abandonment, and to treat the contract as rescinded."

Graves *vs.* White *et al.*, 87 N. Y., 463.

"That, where one party to an executory contract repudiates it by refusing to be bound by its terms, the other party may take him at his word, and act upon it by treating the contract at an end, and bring an action for damages for its breach, is, of course, elementary. The only question is, what will constitute a repudiation ? The true test, stated generally, is whether the acts and conduct of the party evinced an intention no longer to be bound by the contract ; and the fair result of the authorities is that it is not only an absolute refusal in words to perform a contract, but also any clear manifestation by words or acts of an intention not to perform it according to its terms, that will authorize the other party to treat this as a repudiation and bring his action. * * * Neither did it make any difference, so far as concerned defendant's right to act on this as a repudiation, that it might not have

been willful or fraudulent, but the result of a mistake as to the terms of the contract. In planting themselves on their own construction of it, the plaintiffs took their chances; and, as it was in fact incorrect, they must stand the legal consequences of their acts."

Armstrong *vs.* St. Paul & Pac. Coal & Iron Co. (48 Minn., 119-120).

The right of recission depends, not on whether the conduct of one party was inconsistent with the contract, but whether the conduct of one party to the contract was really inconsistent with an intention to be bound any longer by the contract.

Midland Ry. Co. *vs.* Ont. Rolling Mills, 10 Ct. App., 687.
See also Hennessy *vs.* Bacon, 137 U. S., 78.

What if, to the facts just stated is added that the insured voluntarily gave the policy to the company's agent as a thing of no value; that up to the time when Mr. Stimson left the company's employ, and was succeeded by Mr. Pond, no effort, no attempt was made to get it back; that Mr. Pond never heard of it until about ten months after Mr. Phinney's death, and long after his estate had been administered. If the circumstances preceding and attending the default in payment of the premium could be thought insufficient to establish a voluntary abandonment, the succeeding circumstances, his discarding of the policy and his absolute silence concerning it continuing until his death, *until it was no longer possible to serve the statutory notice, surely worked an estoppel.*

In the case of Davis *vs.* Wakelee, 156 U. S., p. 689, in holding that one cannot obtain an advantage over his adversary by asserting and relying upon the validity of a judgment against himself and, in a subsequent proceeding in such judgment, claim that it was rendered illegally, said Mr. Justice Brown:

"It may be laid down as a general proposition that, where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him."

See also Davies *vs.* Cornwall, 35 U. S. App., 315; Dodsworth *vs.* Hercules Iron Works, 31 U. S. App., 292.

And again:

"Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after the litigation has begun, change his ground, and put his conduct upon another and different consideration. He is not permitted thus to mend his hold."

Although in the State of Ohio parol executory agreements for the partition of land made by co-tenants are within the statute of frauds and are not enforceable, yet it has been held (Berry *vs.* Seawell, 31 U. S. App., 30) that such a partition acquiesced in for any considerable length of time, will estop any person joining in it from asserting title or right to possession in violation of its terms.

In that case as in the present there was no question of waiving the statute but the decision went upon the theory that the party, by his conduct, *placed it out of his power to invoke the statute.*

All the elements of an estoppel are present in this case—the voluntary action of the insured, his intention that it should influence the insurer, the fact that it did influence the insurer, and the injury that will result to the latter if the former be permitted to repudiate his action.

The insured, from force of circumstances, abandons the contract of insurance, delivers up the policy and, after nearly two years, dies without having made a move or a sign in repudiation of the abandonment upon the ground

that no notice had been sent, or upon any other ground. True, he asks to have the policy revived and restored, but not as of right but as a favor, and after an application for insurance made by him to another company had been rejected on the ground of his ill health. *Clearly, however, the request was a recognition of the abandonment not a repudiation of it.* Next, the company assents and enters the fact of the abandonment upon its books. In other words, it treats the contract as no longer subsisting and the sending of a notice as logically unnecessary and absurd. Finally there is the injury resulting to the company. It is to be compelled to pay the insurance, simply and solely because notice wasn't sent and the statute requiring notice is said to be mandatory and inflexible, *unless the doctrine of estoppel applies to prevent such a gross injustice to be perpetrated even in the case of a life insurance company. And it does apply.* If the whole conduct of the insured in this case had been the carrying out of a design to defraud the company (and it is difficult to determine motives in any other way than from acts and their natural consequences) what method or scheme would give promise of success greater than that suggested by the acts of the insured in this case, to go to an agent, represent he hadn't the cash to pay his premium, go through the form of asking for an extension, make default, deliver up the policy, and wait. Few agents would think of sending notice even to meet the requirements of a mandatory statute under such circumstances, and the schemer would succeed, *his feeling of security growing with the lapse of time.* This would be preferable to resorting to suicide for the sake of those he holds dear, for he could continue in the enjoyment of life with the refreshing and revivifying feeling that he had provided for them after his death, and his remaining alive would not jeopardize the provision.

Here, what was said in Smith *vs.* New England Mut. Life Ins. Co. (73 Fed. Rep., 772) is peculiarly applicable. We quote:

> "The assured acquiesced in the company's position—that his policy had lapsed—and accordingly neither paid nor tendered subsequent premiums, but treated the policy as a security simply for the interes acquired under the statute. Had his life been continued the claim now made would never have been urged or thought of; his early death alone suggested it. Had he lived ten years longer without payment or tender, this claim would then have been as reasonable as it is now."

A case strikingly applicable to the present is that of Hopkins *vs.* Ins. Co., 78 Ia., 344. The defendant, a fire insurance company, issued to the plaintiff a policy upon certain chattels. It afterwards, through its agent, notified the plaintiff that the policy was cancelled and instructed the agent to return it unearned premiums. The plaintiff assented and proceeded to negotiate for insurance in place of that cancelled. The policy was not formally given up nor was the unearned premium refunded. Nevertheless the Court held that the circumstances disclosed that both parties regarded the policy as annulled. To quote from the opinion:

> "In the case before us the evidence shows that the cancellation was recognized by both the agent of defendant and the assured, and neither party regarded the policy thereafter to be of force. Surely it would be most inequitable for the assured to so speak and act as to induce defendant's agent to believe that plaintiffs regarded the policy as cancelled, and, thus leading them into a feeling of security, induced them not to make formal tender of the unearned premium, and demanded the policy, with proper writing of cancellation endorsed thereon. They are now estopped to set up the non-payment of the unearned premium, after having induced the belief of defendant's agent that cancellation was recognized by them without such payment."

In the case of Shuttle *vs.* Thompson (15 Wall., 151–159), (although that was a case in which the right to waive a statute intended for one's benefit was recognized, and

therefore scarcely on all fours with the theory of the present point, from which, the question of waiver is excluded) the language of the Court is most appropriate. It is as follows :

> " *A party may waive any provision, either of a contract or of a statute, intended for his benefit.* If, therefore, it appears that the plaintiff in error did waive his rights under the act of Congress—if he did practically consent that the deposition should be taken and returned to the Court as it was—*and if by his waiver he has misled his antagonist—if he refrained from making objections known to him, at a time when they might have been removed, and until after the possibility of such removal had ceased, he ought not to be permitted to raise the objections at all. If he may, he is allowed to avail himself of what is substantially a fraud Parties to suits at law may assert their rights to the fullest extent; but neither a plaintiff nor a defendant is at liberty to deceive, either actively or passively, his adversary, and a Court whose province it is to administer justice will take care that on the trial of every cause neither party shall reap any advantage from his own fraud.*"

There is no rule more necessary to enforce good faith than that which compels a person to abstain from asserting claims which he has induced others to suppose he would not rely on. The rule does not rest on the assumption that he has obtained any personal gain or advantage, but on the fact that he has induced others to act in such a manner that they will be seriously prejudiced if he is allowed to fail in carrying out what he has encouraged them to expect.

Dickerson *vs.* Colgrove, 100 U. S., 578-581.

Where a person tacitly encourages an act to be done, he cannot afterwards exercise his legal right in opposition to such consent, if his conduct or acts of encouragement induced the other party to change his position, so that he will be pecuniarily prejudiced by the assertion of such adversary claim.

Swain vs. *Seamens*, 9 Wall., pp. 254, 274.

" It is a sound principle that he who prevents a thing being done shall

not avail himself of the non-performance he has occasioned. Had not the plaintiff dispensed with a further compliance with the condition of the bond, it is probable that the defendant would have taken measures to ascertain what steps were requisite to get the mortgage discharged of record, and would have literally complied with the condition of the bond."

United States vs. *Peck*. *Peck* vs. *United States*, 102 U. S. Rep., pp. 64, 65.

See also Emerson *vs.* Slater, 22 How. Rep., 28–41.
Thomson *vs.* Ins. Co., 104 U. S., 252–258.
Railroad Co. vs. Trimble, 10 Wall., 367, 383.
Lovell *vs.* St. Louis Mut. Life Ins. Co. 111 U. S., 264, 279.
Ins. Co. *vs.* Mowry, 96 U. S., 544.
Ins. Co. *vs.* Eggleston, 96 U. S., 572, 577.
Storm *vs.* U. S., 94 U. S., 76, 83.

Accordingly, we submit that the defendant in error is estopped by the acts and conduct of her testator.

POINT VII.

Defendant in error did not prove her alleged cause of action, and there was a fatal departure from law to law made in rendering the judgment sought to be reviewed because there were no pleadings for such a judgment to be based upon.

The plaintiff below to be entitled to recover should have established

(*a.*) That she performed the conditions of the contract, which she pleaded in which case payment or tender of premiums was necessary, which was not shown by her.

(*b.*) That she was excused from payment or tender by the failure to send the statutory notice which the plaintiff neither pleaded, nor proved.

A.

The plaintiff alleged that she performed the conditions of the contract, but did not prove payment of premiums after September 24, 1890, or tender thereof.

(1.) *Payment of premiums was not proved.*

The complaint of the plaintiff alleges as a cause of action, that the Company, and the deceased made the contract set out in the complaint; that the deceased and defendant in error complied with the terms thereof, and upon such averments demands judgment.

The terms of the contract alleged are plain and unambiguous. By it The Mutual Life Insurance Company of New York agrees to pay to Guy C. Phinney, his executors, etc., the sum of one hundred thousand dollars ($100,000) provided the said Phinney shall pay the annual premium of thirty-seven hundred and seventy dollars ($3,770) on the 24th day of September in each year for twenty (20) full years, or until his death.

The policy of insurance sued upon in this action is an executory contract. It remains executory until the money payable upon the loss is paid. By it the company agrees to pay the beneficiary a certain sum, *provided* the insured shall make it certain payments at stated intervals.

Mutual Life Ins. Co. vs. Wager, 27 Barbour, 354.

The Supreme Court of the United States has said concerning the nature of such a contract as this:

"It is an entire contract of life insurance for life, sub-
"ject to discontinuance and forfeiture for non-payment of

"any of the stipulated premiums. Such is the form of "the contract, and such is its character. * * * Each "installment (premium) is, in fact, part consideration of "the entire insurance for life. It is the same thing where "annual premiums are spread over the whole life. * * * "The whole premiums are balanced against the whole "insurance."

Ins. Co. *vs.* Statham, 93 U. S., 24 (30).
See also Kellner *vs.* Ins. Co., 43 Fed., 623 (627).

It will not be denied that the general rule as to such contracts is correctly stated as follow: "In mutual "promises, the plaintiff, seeking to charge the defendant, "must aver and prove performance on his part of that "which was the consideration of the defendant's promise, "and this, as well, where the promise of the plaintiff was "to be performed before the day fixed for performance by "defendant as where the performance of the respective "promises was concurrent and dependent."

Loud *vs.* Land Co., 153 U. S., 564.
Phillips Co. *vs.* Seymour, 91 U. S., 646 (650).

Defendant in error seems to have realized the force of this rule, for she alleged in her complaint that she had performed all the conditions of the contract on her part, and that her testator had performed all of the conditions of said contract on his part, and made an ineffectual attempt to prove the payment of the premiums.

Performance on the part of the insured and beneficiary, as alleged in the complaint, means and can mean nothing other than payment of the premiums called for by the policy. It is conceded, or found as a fact by the Court, that these premiums were not paid. No sufficient proof of payment was offered in support of the complaint. The attempt made to show such performance was unsuccessful. For this reason plaintiff in error at the conclusion of the

evidence in chief of the defendant in error moved for a non-suit. The motion was denied by the Court. The same question was also properly raised by a request for the instruction set forth at large in paragraph XIII, specification of errors.

This instruction the Court refused to give, and upon such refusal error was duly assigned.

There was an entire "failure of proof."

"When, however, the allegation of the cause of action "or defense to which the proof is directed is not proved, "not in some particular or particulars only, but in its "entire scope and meaning, it shall not be deemed a case "of variance within the last two sections, but a failure of "proof."

2 Hill's Code of Washington, Section 219.
Chilberg *vs.* Jones, 3 Wash., 534.
Marsh *vs.* Wade, 1 Wash., 545.
Glenn *vs.* Sumner, 132 U. S., 150.

Defendant in error did not insist in the Court below, and cannot insist in this Court, that she succeeded in her attempt to prove the payment of the premiums. The lower Court held that the evidence of performance offered and admitted was insufficient to raise an issue, but she allowed the defendant to recover without any sufficient evidence of performance by reason of the construction given by the Court to the New York statute. When the defendant in error failed to prove performance as alleged, as she attempted to do, the Court should have stopped the case there; and when an amendment in the pleadings was called for and had, should have directed the jury to find a verdict for the plaintiff in error.

(2.) *Tender of premiums was not proved, although performance was alleged. If proof of payment was necessary, tender was of course, necessary.*

B.

Defendant in error (1) neither pleaded nor proved that she was excused from payment or tender by the failure to send the statutory notice.

And (2). Even if the statute had been pleaded it did not relieve the defendant in error from paying or tendering premiums before suit.

(1.)

The defendant in error did not plead or prove that she was excused from payment or tender by failure to send the statutory notice.

It has been shown above that payment or tender of premiums was necessary before suit.

The ground upon which recovery was had was not that the contract was performed, but that the provisions of the statute excused performance.

No principle of code pleading is better settled than that the pleader cannot allege performance and recover upon proof that performance was excused or waiver.

Mr. Pomeroy (Pomeroy's Remedies and Remedial Rights, Sec. 556) in discussing this question, says: "The plaintiff is no longer permitted to aver the performance of the required act, and on the trial prove the circumstances which excuse such performance, or prove any other alternative than the one specially alleged."

See also

Oakley *vs.* Morton, 11 N. Y., 25.
Hudson *vs.* McCartney, 33 Wis., 331.
Lumbert *vs.* Palmer, 29 Ia., 104;
Woolsey *vs.* Williams 34 Ia., 413;
Hand *vs.* Ins. Co., 59 N. W. (Minn.) 538;

Evans *vs* Ins. Co., 31 N. E. (Ind.) 843.
Trainor *vs.* Wouman, 34 Minn., 237; 28 N. W. 401;
Mosness *vs.* Ins. Co., 50 Minn., 341; 52 N. W. 932;
Ins. Co. *vs* Brown, 18 S. W. (Tex.) 713.

In Oakley *vs.* Morton, *supra*, the Court, at page 33, says: "Under an avurment of performances * * * evidence in excuse of non-performance was not admissible and should have been excluded," and the other cases are to the same effect.

In the case at bar, the lower Court held that the evidence of performance offered and admitted was insufficient to raise an issue; but allowed the defendant in error to recover without any sufficient evidence of performance by reason of the force and effect given by him to the New York statute.

The statute of New York was not pleaded nor the failure of plaintiff in error to comply with its provisions, nor was it even referred to in the complaint. Where the relief of the statute is relied upon as an excuse for non-performance, the statute itself becomes a necessary part of the pleading, as well as the non-compliance of the insurance company with its requirements, which relieves against the breach of conditions on the part of the insured.

Rosenplanter v. *Provident Sav. Life Assur. Soc., 91 Fed. 728.*

It is not a question as to whether the court takes judicial notice of the statutes of New York, but rather one of *departure from law to law in the pleading.* All the cases cited by the defendant in error on this point are simply to the effect that the United States Courts take judicial notice of State statutes. This is not the controversy. The controversy is partly whether *facts* were pleaded which made the statute applicable. The plaintiff pleaded he had *paid* all the premiums. If so, the stat-

ute had no applicability. Whether a party who pleads a specific contract and performance on his part of its conditions, as his right to recover shall be permitted after performance has been controverted, to confess his non-compliance and shift his right of recovery to an unpleaded statute of a foreign State and assert non-compliance with its provisions on the part of defendant, and adopt the defendant's non-compliance with the unpleaded statute as his own excuse for non-compliance with the conditions of the contract alleged in his complaint, is the question here. The right of action alleged and then abandoned is the act of the party; that not alleged but relied upon is the act of the legislature of New York. With performance of the conditions alleged the right of action is perfect, regardless of the New York statute. Without performance of the conditions alleged, there is no right of action whatever, unless it can be established through the statute of New York. *If the statute of New York, instead of performance of the conditions of the contract by defendant in error, affords the ground of recovery, then pleading of the statute is indispensable.*

Union Pacific Railway v. *Wyler*, *158 U. S.*, *285*.

In the case cited, a party sued the railway company for a personal injury, basing his right to recover upon the general law of master and servant. After the cause had been transferred to the Federal Court and remained in litigation for a number of years, the plaintiff amended his complaint so as to bring himself under the fellow-servant act of the State of Kansas. Upon amendment being made, the defendant interposed the statute of limitations as to an original suit begun at the date of amendment. Mr. Justice WHITE, in delivering the opinion of the Court, adopted the following definitions and illustrations of departure:

"Coke upon Littleton, 304 *a* says: 'When a man in his former plea pleadeth an estate made by the common law, in the second plea regularly he shall not make it good by an act of Parliament. So when in his former plea he intituleth himself generally by the common law, in his second plea he shall not enable himselfe by a custome, but should have pleaded it first.'

"Comyn's Digest, 'Pleader' (F. 8.), states the same rule, and gives the following illustrations of departure:

"'In debt on bond by sheriff against his bailiff to pay him 20d. for every defendant's name in every warrant in mesne process, defendant pleads he had paid it, plaintiff replies that he had not paid it for A; defendant rejoins Stat. 23 H. 6, and 3 G. it is a departure; for pleading he has had and rejoining he ought not to pay; and for pleading common law plea, and rejoining a statute. *Balantine* v. *Irwin*, *M.* 4 *G.* 2, *C. B. Fort*, *368*.

"'So, if a man avows, for that A being seized in fee granted to him a rent, and the defendant pleads, nothing in the tenements at the time of the grant, and the plaintiff rejoins that A. was *cestuy que use* in fee, which use is now executed by the statute of uses; this is a departure.' *Pl. Com. 105 b.*

"Chitty on pleading, *1 pp. 674 675*, states the principle as follows: 'A departure may be either in the substance of the action or defence, or the law on which it is founded; as if a declaration be founded on the common law, and the replication attempt to maintain it by a special custom, or act of Parliament.'

"Stephen on Pleading, *pp. 412*, *413*, thus elucidates the point: 'These, it will be observed, are cases in which the party deserts the ground, in point of fact, that he had first taken. But it is also (*a*) departure, if he puts the same facts on a new ground in point of law; as if he relies on the effect of the common law, in his declarations, and

on a custom in his replication; or on the effect of the common law in his plea, and a statute in his rejoider.'

"Gould on Pleadings, *pp. 423, 424*, says:

"'When the matter, first alleged as the ground of action or defence, is pleaded as at common law, any subsequent pleading by the same party, supporting it by a particular custom, is a departure' (*pp. 290-291*).

And in applying the foregoing rules, says:

"A suit based upon a cause of action alleged to result from the general law of master and servant was not a suit to enforce an exceptional right given by the law of Kansas. If the charge of incompetency in the first petition was not *per se* a charge of negligence on the part of the fellow-servant, then the averment of negligence apart from incompetency was a departure from fact to fact, and, therefore a new cause of action. Be this as it may, as the first petition proceeded under the general law of master and servant, and the second petition asserted a right to recover in derogation of that law, in consequence of the Kansas statute, it was a departure from law to law. This conclusion is strengthened by the fact that in most of the states the laws of other state are treated as foreign laws, which must be pleaded and proven. Sedgwick on Statutory and Constitutional Law, *363*; *Hempstead* v. *Reed*, *6 Connecticut*, *480*; *Swank* v. *Hufnagle*, *111 Indiana*, *453*; *Root* v. *Merriweather*, *8 Bush*, *397*. Although this rule is not invariably adhered to, it is part of the law as administered in the state of Missouri.

Babcock v. *Babcock*, *46 Missouri*, *243*.

"The suit here was brought in a Missouri court, and was necessarily controlled by the law of that state.

"It is argued, however, that, as all the facts necessary to recovery were averred in the original petition, the subsequent amendment set out no new cause of action in

alleging the Kansas statute. If the argument were sound, it would only tend to support the proposition that there was no departure or new cause of action from fact to fact, and would not in the least meet the difficulty caused by the departure from law to law. Even though it be conceded that all the facts necessary to give a right to recover were contained in the original petition, as this predicated the assertion of that right on the general law of master and servant, and not upon the exceptional rule established by the Kansas statute, it was a departure from law to law. The most common, if not the invariable, test of departure in law, as settled by the authorities referred to, is a change from the assertion of a cause of action under the common or general law to a reliance upon a statute giving a particular or exceptional right. It is true that the Federal Courts take judicial notice of the laws of the several states. *Priestman* v. *United States*, *4 Dall.*, *28*; *Owings* v. *Hull*, *9 Pet.*, *607*; *Covington Drawbridge Co.* v. *Shepherd*, *20 How.*, *227*; *Cheever* v. *Wilson*, *9 Wall.*, *108*; *Junction Railroad* v. *Bank of Ashland*, *12 Wall.*, *226*. This rule, however, does not affect the present suit, which was commenced in the Court of Missouri. Moreover, the departure which arises from relying, first, upon the general or common law, and, in the second instance, on an exceptional statute, is a question of pleading, and is not controlled by the law in regard to judicial notice of statutes which is a matter of evidence. The very origin of the rule in regard to departure from law to law makes this obvious. The English courts, from which our doctrine upon this subject is derived, necessarily take judicial notice of acts of Parliament, yet there a departure is made and a new cause of action is asserted when a party who has at first relied upon the common law afterwards rests his claim to recovery upon a statute." (*pp. 295-296.*)

The preserved distinction between legal and equitable

remedies in the Federal courts prevents such a departure as was made in this case. It is not contended one is entitled to insurance without payment at some time and in some form, of the premiums with which the insurance is purchased; it is not claimed that failure to give the statutory notice operates as a payment. How, then, on a complaint that avers performance of all conditions, that is, payment of all premiums, is the common law court to enter into the field of accounting and ascertain what premiums have been paid and what have not, compute interest on the unpaid premiums according to the law of the forum of the State of New York, and render its judgment or decree for whatever equitable balance may be found due? Suppose such a practice adopted where a policy had been issued to a middle-aged person immediately upon the enactment of the statute of 1877, and but a single annual premium paid, and death occurred about this time and an action should be brought upon that policy in the form adopted in this case. The aggregate of unpaid premiums and their accumulated interest would constitute an equitable set-off exceeding the amount of the policy. If, without pleadings framed for the purpose, the plaintiff is entitled to recover, why not the insurance company, the balance being in its favor?

Even if the statute of 1877 had been pleaded, it did not relieve the plaintiff in error from paying or tendering premiums before suit to recover the full insurance.

The complaint is entirely destitute of any allegation of the statute, or of any averment of facts bringing this case within the statute, if it applied.

It is immaterial whether the statute was relied upon contractually, or as a law controlling the contract by reason of other considerations. In either case it was the duty of defendant in error as long as the premiums had not been paid to set up in her complaint the facts bring-

ing the case within the statute, if it applied. Failing to do so, she should not have been allowed to recover by force of the statute.

Where one seeks to maintain a right under a statute, his pleading must state specially every fact requisite to enable the Court to judge whether he has a cause of action arising under the statute.

Austin *vs.* Goodrich, 49 N. Y., 266.
Churchill *vs.* Onerdonk, 59 N. Y., 134.
Railroad Co. *vs.* Sturgis, 44 Mich., 538; 7 N. W., 213.

The terms of the policy sued on would have effectually prevented a recovery, unless aided by the statute as claimed by defendant in answer.

The defendant in error was not entitled to have this statute considered either by the Court or the jury, except upon proper averments in the pleadings of that statute, or facts showing that the statute was applicable.

In the light of these decisions, the necessity of pleading facts to bring the case within the provisions of a statute when the whole success of the case depends upon those provisions, should not be questioned. But what is to be said, keeping these cases in view, as to the necessity of pleading a foreign statute. The case of Baxter *vs.* Ins. Co. (*supra*) relied upon by the other side was the case of the construction of a New York statute by a New York Court, unlike the present in which a New York statute is the subject of a suit brought in a Washington Court. In a case not long since decided in the Supreme Court of Texas the rules recognized in the cases which we have cited are absolutely ignored. The case is Mullen *vs.* Mutual Life Ins. Co. (34 S. W. R., 605).

The Court of Civil Appeals had held that evidence was admissible on the part of the defendant to prove notice and forfeiture though they had not been affirmatively alleged by defendant, where plaintiff had alleged and de-

fendant had denied specifically that the policy was in force at the death of the insured and that the terms of the policy as to the payment of premiums had been complied with. In reversing the judgment based upon this opinion said the Supreme Court:

> "We concede that a plaintiff by making allegations in the petition which are unnecessary, may relieve the defendant of the necessity of either pleading or proving purely defensive matter, but whether the plaintiff in error has done so depends to a large extent, we think, upon the construction to be given to the New York statute incorporated in the contract."

That construction is as given in Baxter *vs.* Ins. Co. (119 N. Y., 454), and is, briefly, that the insured cannot be regarded, in the light of the statute, as in default, until thirty days after notice before the due date in the policy.

"Viewed," says the Court, "in the light of this construction which this Court must accept, it would seem that the plaintiff in error only alleged in his petition what was legally true, and only what was necessary to show a right to recover." We ask, how is a Washington attorney called upon to defend the Company in a Washington Court, to know that what the plaintiff alleges is legally true if it is true only in the light of a foreign statute as to which the petition is silent? "While it is true," continues the learned Court," that he failed to pay two of the matured premiums before his wife's death, yet, in the absence of notice, such failure had no effect upon his legal rights in the premises, and did not constitute a breach of his obligation to pay premiums. It also follows that the allegation that Maud J. Mullen died during the continuance of the policy was legally and literally true in the absence of the notice provided in the New York statute. If we have taken a correct view of the plaintiff's pleadings, as he did not allege anything with reference to notice, he did not thereby relieve the defendant of the necessity of pleading and proving the defense of forfeiture."

The learned Court must, for the moment, have been blind to the fact that Courts cannot take judicial notice of a foreign statute; that a foreign statute must be pleaded and proved in a State Court as a fact; that if, by reason of the foreign statute alone, the policy was in force when the assured died, the defendant, and the defendant's attorneys, practicing in the Courts of the State in which the action was pending, were entitled to be informed of the existence of such a statute as a matter, not of law, but of fact.

When the defendant in error failed to prove performance as alleged, as she attempted to do, the Court should have stopped the case there; and unless an amendment in the pleadings was called for and had, should have directed the jury to find a verdict for the plaintiff in error.

The plaintiff in error contends that the New York statute does not purport to relieve the assured of performance of the condition precedent namely to pay his premium at the time they fell due, nor does it attempt to confer upon him the right to maintain an action upon other terms, or under other circumstances than he would otherwise have it. It does not purport to act upon the contractual rights of the parties to the policy, nor upon their remedies to enforce such rights, except in so far as it prohibits the company's declaring any policy, to which it is applicable, forfeited unless and until a certain notice is sent. Under no circumstances does it give the beneficiary the right to demand performance by the company, that is, payment of the insurance upon any terms other than the performance by the insured, that is, payment of the premiums or tender although he may be by the statute protected from the results which would otherwise follow from failure to pay at the due day.

Therefore, when upon a policy to which the statute is

applicable, a premium matures and is not paid and no notice is sent, the policy continues in force and the assured has the right to pay the premium at a day subsequent to the due date, and the beneficiary to demand performance at the maturity of the policy, *upon payment or tender of accrued premiums.*

The statute does not purport to relieve the insured from the payment or tender of premiums, but only to provide a method of forfeiture.

Because the statutory notice has been sent, it may follow from the terms of the statute there applicable, that the hand of the company is stayed from declaring the policy forfeited, but rights of the parties to the contract are otherwise unaffected by the the statute.

The payment of the premium is a *condition precedent* to the continued existence of the contract. It is not an obligation. The effect of the non-fulfillment of this condition is to render the contract void.

The parties to such a policy, therefore, are in just the same position by virtue of this statute, in cases to which it is applicable, as they would be if the hand of the company were stayed from declaring a forfeiture of the policy by reason of conduct on its part amounting to a waiver of payment of the premium at the due date.

The company has a right to forfeit the policy by the giving of the prescribed notice if the statute is applicable; by failing to give such notice it simply waives the right of forfeiture. In no sense does it waive its rights to be paid its premium before being called upon to perform. Notwithstanding the New York statute, therefore, and even if it be held that it is applicable to, and governs this contract, there became due from Mr. Phinney to the company on September 24, 1891, a premium of thirty-seven hundred and seventy dollars ($3,770), and such premium remained due at the beginning of this action.

The Supreme Court of the United States has decided this question in accordance with the contention of the plaintiff in error.

Thompson *vs.* Ins. Co., 104 U. S., 252 (260).
Insurance Co. *vs.* Unsell, 144 U. S., 439 (447).

In the case of Thompson (*supra*) it was contended by the beneficiary under the policy that the company had waived forfeiture for the non-payment of the premiums at the due date, and relying upon such waiver, action was commenced without payment or tender of the premium; and the Court in discussing this question says: "A fatal objection to the entire case set up by the plaintiff is, that payment of the premium note in question has never been made or tendered at any time. There might possibly be more plausibility in the plea of former indulgence and days of grace allowed, if payment had been tendered within the limited period of such indulgence. But this has never been done. The plaintiff has therefore failed to make a case for obviating and superseding the forfeiture of the policy, even if the circumstances relied on had been sufficiently favorable to pave the ground for it. A valid excuse for not paying promptly on the particular day, is a different thing from an excuse for not paying at all."

In the Unsell case (*supra*) the beneficiary relied upon a waiver as excusing payment of the premium at the time the same was due, and as defeating the right of the company to forfeiture; but there was evidence in this case that payment of the premium had been tendered subsequent to the due date. In discussing this question, Justice HARLAN, at p. 447, says: "If the plaintiff had sued on the policies or certificates *without having paid or tendered the amount due to the company*, the non-payment of which, at the time stipulated, was relied on to prove that the policies had become forfeited, that *fact*

would have been fatal to a right to recover, in any view of the case."

These authorities and binding decisions establish the principle that where the beneficiary relied upon some act or omission of the company preventing forfeiture, no action can be maintained except upon payment or tender of the premiums due; and we submit that the Court committed reversible error in refusing to give the instructions set out in paragraphs IX and X of the Specification of Errors.

Counsel for the plaintiff in error are not unmindful of the fact that the views presented in this brief on the subject of tender and performance are in conflict with the decision of the Court of Appeals of the State of New York, in which case, however, three Judges out of seven dissented.

Baxter *vs.* Ins. Co., 119 N. Y., 450.

But we submit:

1st. That the case at bar cannot be distinguished from the Thompson and Unsell cases, and that this Court will follow the decisions of the Supreme Court of the United States, rather than the decisions of the Court of Appeals of the State of New York in the application of the principle here contended for.

2d. That the decision in the Baxter case was not in this respect a construction of the New York statute, but a decision upon a question of practice and pleading in the State of New York, and upon the general principles of the law of contracts, and a Federal Court is, therefore, not bound thereby. That Court does not reach its conclusion that a tender is unnecessary before beginning suit by reason of anything contained in the New York statute. The statute is silent as to how the rights it attempts to preserve may be enforced. All that is left by the statute

to the general principles of the law of contracts. In the application of the general principles of the law of contracts to the facts of a particular case, the Federal Courts exercise an independent judgment and follow their own convictions. This has been expressly decided with regard to insurance contracts.

Carpenter *vs.* Ins. Co., 16 Peters, 495 (511)

Although the effect of a State statute may be involved, still if the question presented is one of general law, the Federal Courts are not bound by the construction placed upon such statute by the State Courts.

Venice *vs.* Murdock, 92 U. S., 494.

In the case the Court says, at p. 501:

"It is argued, however, that the New York decisions "are judicial constructions of a statute of that State; and, "therefore, that they furnish a rule by which we must be "guided. The argument would have force if the decisions, "in fact, presented a clear case of statutory construction; "but they do not. They are not attempts at interpreta- "tion. * * * They assert general principles, to wit: "that persons empowered to borrow money and give bonds "therefor, for the purpose of paying it to an improve- "ment company, are not authorized to deliver the bonds "directly to the company; a doctrine denied in this "Court. * * * They assert, also, that where an au- "thority is given to an officer to execute and issue bonds "(on the assent to be obtained by the voters of a town, "the assent to be obtained by the officer and filed in a "public office, with an affidavit verifying the assent), the "verification amounts to nothing, subserves no purpose, "and that a *bona fide* holder of the bonds is bound to "prove that the requisite number of voters did actually "assent. They assert this as a general proposition.

"They do not assert that the statute so declares, or that "such is even its implied requisition. *There is, there-* "*fore, before us no such case of the construction of a* "*State statute by State Courts as requires us to yield our* "*own convictions of the right and blindly follow the lead* "*of others, eminent as we freely concede they are.*"

See also Watson *vs.* Tarpley, 18 Howard, 517 (520).
Liverpool Steam Co. *vs.* Phenix Ins. Co., 129 U. S., 397 (443).

The decision in the Baxter case, that it is not necessary to plead the statute, or the facts bringing the case within the statute, or to tender the past due premiums, simply establishes principles of practice and procedure for the State of New York, and is therefore in no way binding upon this Court, or upon a Circuit Court sitting in the State of Washington.

By Section 914 of the Revised Statutes of the United States the practice of Circuit Courts in law cases is assimilated to the practice of the State in which the Court is sitting. The Supreme Court of the State of Washington has expressly withheld its approval of the rule laid down in the Baxter case so far as it decides that the beneficiary may sue without payment or tender of past due premiums.

Griesemer *vs.* Ins. Co., 10 Wash., 202 (211).

In which the Court says (page 211): "We have decided "this latter case without regard to the case of Baxter *vs.* "Brooklyn Life Ins. Co., 119 N. Y., 450 (23 N. E., 1048), "in which it was held by a majority of the Court that the "premium was not due in the sense that the company "could derive any advantage from its non-payment until "after the notice required by the statute had been given, "for the reason that the minority of the Court in its dis- "senting opinion has presented such arguments as to "make us doubt the correctness of the decision.

The dissenting opinion in the Baxter case was as follows:

"ANDREWS, J. (dissenting): I dissent from the prevailing opinion "in this case. The sole purpose of the statute of 1877, a purpose indi- "cated as well by the title as the body of the act, was to abrogate the "rule that the failure to pay the premium on a life policy on the day "specified therein created a forfeiture, and rendered the policy void. "The act, therefore, provided that non-payment of the premium at the "day should not work a forfeiture, and that the policy should continue "in force, notwithstanding such omission, until notice by the company "and default of the insured for thirty days thereafter to make pay- "ment. The construction placed on the statute in the prevailing "opinion, that by its operation the premium does not become due until "after notice and expiration of the thirty days, and that meanwhile an "action may be brought and a recovery had on the policy, although "the premium is due from the time it becomes due according to the "terms of the policy, and remains due at all times thereafter until "actually paid, but under the statute default in making payment at the "pay-day, nevertheless, leaves the contract of the company subsisting, "and an action may, therefore, be maintained upon it in case of the "death of the insured, unless it is shown that the notice has been "given and that the premium was not paid within thirty days there- "after."

"But it is a condition precedent to the maintenance of such action "that the plaintiff must before suit brought have paid or tendered the "premium unpaid. The plaintiff under the statute of 1877, is not re- "quired as before to show that it was paid or tendered on the day fixed "in the policy, but he must aver and prove that payment was made at "some time before the action was commenced, or else no right of ac- "tion has accrued. This is in accordance with the well-settled rule "that in mutual promises the plaintiff seeking to charge the defendant, "must aver and prove performance on his part of that which was the "consideration of the defendant's promise, and this as well where the "promise of the plaintiff was to be performed before the day fixed for "performance by the defendant, as where the performance of respective "promises were concurrent and dependent. The construction I have "given to the statute of 1877 fully accomplishes its purpose while re- "lieving it of the anomaly that a contract to pay an insurance on con- "dition of the payment of the premiums may be enforced, although the "party claiming performance has never paid or offered to pay what was "stipulated.

"The cases in Massachusetts and other States have, I think, no bear- "ing upon the present one. They were well decided, and involved no "such question as is presented in this case under the statute of "1877."

3d. The Baxter case, although emanating from a distinguished and learned Court, was decided by a divided Court, four Judges voting for affirmance and three for reversal; and the dissenting opinion of Judge Andrews, concurred in by Judges Earl and Gray, is a strong argument in favor of the correctness of the views above expressed.

POINT VIII.

The judgment should be reversed.

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APPENDIX.

NEW YORK PREMIUM NOTICE STATUTES.

L. 1876 Ch. 341 (May 15, 1876).
amended by
L. 1877 Ch. 321 (May 23, 1877).
repealed by
L. 1892 Ch. 690, Sec. 295 (took effect Oct. 1, 1892).
new statute enacted by
L. 1892 Ch. 690, Sec. 92 (took effect Oct. 1, 1892).
amended by
L. 1897 Ch. 218 (took effect Apl. 8, 1897).

LAWS OF 1876.

CHAPTER 341.

AN ACT regulating the forfeiture of life insurance policies.

Passed May 15, 1876.

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

SECTION 1. No life insurance company doing business in the State of New York shall have power to declare forfeited or lapsed any policy hereafter issued or renewed, by reason of non-payment of any annual premium or interest, or any portion thereof, unless a notice in writing, stating the amount of annual premiums or interest due and when due on such policy, and the place where said premium or interest may be paid, shall have been duly addressed and mailed by the company issuing such policy to the insured, postage paid, at his or her last

known post office address, not less than thirty nor more than sixty days next before such payment becomes due, according to the terms of such policy.

SEC. 2. The affidavit of any officer, clerk or agent of the company that the notice to the assured, provided for in Section, one has been duly addressed and mailed by the company issuing such policy to the assured, shall be presumptive evidence of such notice having been duly given.

SEC. 3. This act shall take effect immediately.

LAWS OF 1877.

CHAP. 321.

AN ACT to amend chapter three hundred and forty-one of the laws of 1876, entitled "An act regulating the forfeiture of life insurance policies."

Passed May 23, 1877.

THE PEOPLE OF THE STATE OF NEW YORK REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

SECTION 1. Section one of chapter 341 of the laws of eighteen hundred and seventy-six, entitled 'An act regulating the forfeiture of life insurance policies, is hereby amended so as to read as follows:

SEC. 1. No life insurance company doing business in the State of New York shall have power to declare forfeited or lapsed any policy hereafter issued or renewed by reason of non-payment of any annual premium or interest, or any portion thereof, except as hereinafter provided. Whenever any premium or interest due upon any such policy shall remain unpaid when due, a written or printed notice stating the amount of such premium or interest due on such policy, the place where said premium

or interest should be paid, and the person to whom the same is payable, shall be duly addressed and mailed to the person whose life is assured, or the assignee of the policy, if notice of the assignment has been given to the company, at his or her last known post office address, postage paid by the company, or by an agent of such company or person appointed by it to collect such premium. Such notice shall further state that unless the said premium or interest then due shall be paid to the company or to a duly appointed agent or other person authorized to collect such premium within thirty days after the mailing of such notice, the said policy and all payments thereon will become forfeited and void. In case the payment demanded by such notice shall be made within the thirty days limited therefor, the same shall be taken to be in full compliance with the requirements of the policy in respect to the payment of said premium or interest, anything therein contained to the contrary notwithstanding; but no such policy shall in any case be forfeited or declared forfeited or lapsed until the expiration of thirty days after the mailing of such notice. Provided, however, that a notice stating when the premium will fall due, and that if not paid the policy and all payments thereon will become forfeited and void, served in the manner hereinbefore provided, at least thirty and not more than sixty days prior to the day when the premium is payable, shall have the same effect as the service of the notice hereinbefore provided for.

SEC. 2. The affidavit of any one authorized by section one to mail such notice, that the same was duly addressed to the person whose life is assured by the policy, or to the assignee of the policy, if notice of the assignment has been given to the company, in pursuance of said section, shall be presumptive evidence of such notice having been given.

CHAPTER 690, SEC. 92.

SEC. 92. *No forfeiture of policy without notice.* No life insurance corporation doing business in this State shall declare forfeited, or lapsed, any policy hereafter issued or renewed, and not issued upon the payment of monthly or weekly premiums, or unless the same is a term insurance contract for one year or less, nor shall any such policy be forfeited, or lapsed, by reason of non-payment when due of any premium, interest or installment or any portion thereof required by the terms of the policy to be paid, unless a written or printed notice stating the amount of such premium, interest, installment, or portion thereof, due on such policy, the place where it should be paid, and the person to whom the same is payable, shall be duly addressed and mailed to the person whose life is insured, or the assignee of the policy, if notice of the assignment has been given to the corporation, at his or her last known post office address, postage paid by the corporation, or by an officer thereof, or person appointed by it to collect such premium, at least fifteen and not more than forty-five days prior to the day when the same is payable.

The notice shall also state that unless such premium, interest, installment, or portion thereof, then due, shall be paid to the corporation or to a duly appointed agent or person authorized to collect such premium by or before the day it falls due, the policy and all payments thereon will become forfeited and void except as to the right to surrender value or paid-up policy as in this chapter provided.

If the payment demanded by such notice shall be made within its time limited therefor, it shall be taken to be in full compliance with the requirements of the policy in respect to the time of such payment; and no such policy shall, in any case, be forfeited or declared forfeited

or lapsed, until the expiration of thirty days after the mailing of such notice.

The affidavit of any officer, clerk or agent of the corporation, or of any one authorized to mail such notice, that the notice required by this section, has been duly addressed and mailed by the corporation issuing such policy shall be presumptive evidence that such notice has been duly given.

(The above act in § 295 also repealed the acts of 1876 and 1877.)

LAWS OF 1897.

CHAP. 218.

(This act amended § 92 above as follows:)

"SEC 92.—NO FORFEITURE OF POLICY WITHOUT NOTICE.—No life insurance corporation doing business in this State shall within one year after the default in payment of any premium, installment or interest declare forfeited or lapsed—any policy hereafter issued or renewed and not issued upon the payment of monthly or weekly premiums, or unless the same is a term insurance contract for one year or less, nor shall any such policy be forfeited, or lapsed, by reason of non-payment when due of any premium, interest or installment or any portion thereof required by the terms of the policy to be paid, within one year from the failure to pay such premium, interest or installment unless a written or printed notice stating the amount of such premium, interest, installment, or portion thereof, due on such policy, the place where it shall be paid, and the person to whom the same is payable, shall have been duly addressed and mailed to the person whose life is insured, or the assignee of the policy, if notice of the assignment

has been given to the corporation, at his or her last known post office address in this State, postage paid by the corporation, or by any officer thereof, or person appointed by it to collect such premium, at least fifteen and not more than forty-five days prior to the day when the same is payable. The notice shall also state that unless such premium, interest, installment or portion thereof, then due, shall be paid to the corporation, or to the duly appointed agent or person authorized to collect such premium by or before the day it falls due, the policy and all payments thereon will become forfeited and void except as to the right to a surrender value or paid-up policy as in this chapter provided. If the payment demanded by such notice shall be made within its time limited therefor, it shall be taken to be in full compliance with the requirements of the policy in respect to the time of such payment; and no such policy shall in any case be forfeited or declared forfeited, or lapsed, until the expiration of thirty days after the mailing of such notice. The affidavit of any officer, clerk, or agent of the corporation, or of any one authorized to mail such notice that the notice required by this section has been duly addressed and mailed by the corporation issuing such policy shall be presumptive evidence that such notice has been duly given. No action shall be maintained to recover under a forfeited policy, unless the same is instituted within one year from the day upon which default was made in paying the premium, installment, interest or portion thereof for which it is claimed that forfeiture ensued.

SEC. 3. This act shall take effect immediately."